Supreme Court, U.S.
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In The
Supreme Court of the United States

JANE DOE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REDACTED PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, an attorney was forced to disclose to a grand jury privileged communications with his client in which he simply rendered advice for proper compliance with a subpoena because, after the communication, the client [REDACTED]. The finding that the attorney's communication *could have* given the client the information necessary to "obstruct justice" could apply to every communication between any attorney and any client in criminal proceedings. An attorney's duties necessarily include keeping his client informed. The Third Circuit's decision will have an impermissible and absolute chilling effect upon the attorney-client relationship in the criminal context and will significantly alter the balance between disclosure and privilege.

The questions presented are: Whether the lower court decisions in effect give the government free access to privileged communications by allowing the mere assertion by the government that an individual under investigation is obstructing justice to be sufficient to support the conclusion that communications between that individual and his attorney regarding details of the investigation are "in furtherance of" the crime of obstruction of justice for purposes of the crime-fraud exception to the attorney-client privilege, because arguably any communication regarding the status of the investigation could assist that client in obstructing justice, thereby inviting an unwarranted expansion of the crime-fraud exception resulting in the evisceration of the attorney-client privilege such that attorneys and clients are pitted against each other to the benefit of the government; and

QUESTIONS PRESENTED – Continued

Whether the inability of a client to effectively challenge the application of the crime-fraud exception to the attorney-client privilege in grand jury proceedings by being denied the court's full opinion and entire rationale violates the client's due process rights and allows the government an unfair advantage by presenting *ex parte, in camera* evidence in support of its claim that the crime-fraud exception applies, without affording the client the opportunity to confront and rebut the evidence?

PARTIES TO THE PROCEEDING

Petitioner is Jane Doe. The parties to the proceeding in the Court of Appeals were Jar Doe and the United States of America.

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The April 21, 2006 Opinion of the Third Circuit Court of Appeals is reported at 445 F.3d 266 and is included in Petitioner's Appendix ("App.") at 1a. The May 19, 2006 Order of the Third Circuit Court of Appeals denying Petitioner's Petition for Rehearing *en banc* of the panel decision of April 21, 2006 is unreported but is included in the Appendix (App. at 56a). The February 9, 2006 Order of the Third Circuit Court of Appeals denying Petitioner's Emergency Motion to Release Full Opinion and/or to Unredact District Court Opinion or in the Alternative to Appoint or Allow Retention of Special Counsel to View Opinion in its Unredacted Form is unreported but is included in the Appendix (App. at 31a). The February 1, 2006 Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania granting the Government's Motion to Enforce the March 1, 2005 and March 10, 2005 Grand Jury Subpoenas and to Compel Testimony of Attorney, denying Attorney's Motion to Quash or Modify the Subpoenas and denying Jane Doe's Motion to Quash or Modify the Subpoenas is unreported but is included in the Appendix (App. at 33a).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on April 21, 2006. The court entered an order denying a timely petition for rehearing *en banc* on May 19, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) to review on a writ of certiorari the April 21, 2006 and the May 19, 2006 Orders of the Third Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies to which the United States shall be a Party. . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Rule 501 of the Federal Rules of Evidence provides in pertinent part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . ."

STATEMENT OF THE CASE

This case arises out of a grand jury investigation instigated by the United States Attorney for the Eastern District of Pennsylvania. A significant focus of the underlying investigation are the activities and conduct of the XYZ Corporation (the "Corporation"), and several individuals. At all times relevant, Jane Doe was the Executive Director of the Corporation. On April 28, 2004, the Corporation was served with a grand jury subpoena by the government.

The Corporation then promptly retained John Doe ("Attorney") and his law firm as counsel to represent the Corporation in connection with the investigation. Jane Doe also retained personal counsel.[1]

Attorney for the Corporation produced *thousands* of documents responsive to this subpoena. On January 19, 2005, the government served a second subpoena on the Corporation, accompanied by a letter delineating the government's position concerning compliance.

On or about March 1, 2005, the government issued a grand jury subpoena to Attorney for testimony and records, to wit,

> From the period April 28, 2004, to the present, with respect to [Corporation], provide the following records concerning or pertaining to the Grand Jury subpoenas issued to [Corporati..] on April 28, 2004 and January 19, 2005 (the "subpoenas") and the letter dated January 19, 2005 from government counsel to [Attorney] (the "letter"): Any and all billing records, time sheets, fax cover sheets, memoranda, correspondence and other records concerning or relating to communications with [Corporation], its officers, employees and their attorneys, and government counsel regarding the requirements of the subpoenas and letter, understandings and agreements reached with government counsel concerning the subpoenas and the letter, and efforts to comply with the

[1] Jane Doe and the Corporation share a mutuality of interest in the matters under investigation. Accordingly, on behalf of their clients, counsel for the Corporation and for Jane Doe executed a joint defense agreement and adopted a common defense strategy.

> subpoenas and letter and agreements with government counsel.

App. at 58a. A similar subpoena was served on Attorney's law firm. On March 10, 2005, personal counsel for Jane Doe wrote to counsel for the Attorney asserting the attorney-client privilege as well as the work product/joint defense privilege with respect to the subject subpoenas. The government took no action to enforce the subpoenas for a period of nine months during which time Attorney and the government discussed the prospect of Attorney submitting an Affidavit in lieu of testimony.

On January 4, 2006, Jane Doe filed, under seal, a Motion to Intervene and to Quash Subpoenas Addressed to Attorney and Attorney's Law Firm in Grand Jury Investigation. Counsel for Attorney filed his own Motion to Quash the Subpoenas. On that same date, the government filed a Motion to Enforce Grand Jury Subpoenas and Compel Testimony, and submitted *in camera* an *ex parte* affidavit to the supervising judge of the Grand Jury. Importantly, Jane Doe has not been privy to the information provided in the *ex parte* affidavit submitted to the district court and, hence, had no opportunity in the lower courts to challenge, rebut or dispute the information contained therein.

The particular focus of the government's subpoenas at issue was a January 20, 2005, telephone conversation between Attorney on the one hand, and Jane Doe and Jane Doe's private counsel on the other. At oral argument before the district court on January 17, 2006, in an attempt to address what might have been in the government's previously submitted *ex parte*, *in camera* Affidavit, *ex parte*, *in camera* testimony was presented to the Court by Attorney

as well as counsel for Jane Doe.[2] Both Attorney and counsel for Jane Doe testified [REDACTED].

On February 1, 2006, the District Court entered an Order enforcing the subpoenas. The Court's Order specifically directed Attorney to appear before the grand jury and testify to matters, [REDACTED]. The Court further ordered that Attorney [REDACTED].

Initially, the District Court refused to release its Memorandum Opinion in support of its Order purportedly to accommodate the confidentiality concerns of the parties. Subsequently, upon request by counsel for Jane Doe and Corporation, the Court provided the parties with a significantly redacted version of its Memorandum Opinion. App. at 33a-54a. In its redacted Opinion, the District Court specifically found that "Attorney's January 20, 2005 conversation with Jane Doe falls under the aegis of the attorney-client privilege." App. at 42a-43a. The District Court further found that "Attorney's January 20, 2005 verbal communications to Jane Doe [redacted], as well as Attorney's hand written notes memorializing this conversation, constitute work product." App. at 44a.

The District Court nonetheless found that [REDACTED]. The District Court's unredacted Opinion has never been provided to Jane Doe or her Counsel or Corporation or its counsel.

The government sought immediate production of the subject documents and Attorney's testimony before the

[2] The transcript of this hearing, while extremely relevant, is not included in Petitioner's Appendix because it has never been provided to the government.

grand jury on February 7, 2006. Jane Doe's requests for stays from the district court and from the Third Circuit were denied. Attorney testified and produced documents on February 7, 2006.

Jane Doe appealed. On April 21, 2006, the Third Circuit issued its Opinion affirming the District Court's Order. The Third Circuit found that the elements of the crime-fraud exception were established because "there was sufficient evidence to support the District Court's finding that Jane Doe could be found to have engaged in the ongoing crime of obstruction of justice," *In re Grand Jury Investigation*, 445 F.3d 266, 275 (3d Cir. 2006), and further that the temporal proximity of the alleged crime after the January 20th communication with her attorney is an "indication that Jane Doe intended to use the information she gathered from the January 20 communication to further the scheme to obstruct." *Id.* at 279.

REASONS FOR GRANTING THE PETITION

The two courts below have interpreted the crime-fraud exception to the attorney-client privilege so broadly as to have effectively eliminated that privilege in the Third Circuit. The issues raised herein are of exceptional importance, with implications well beyond the specific application of the crime-fraud exception in this case, especially in light of the conflict among the Circuit Courts. Since the decision of the Third Circuit compromises every relationship between attorney and client, particularly in the criminal context, where consultation with counsel is most valuable and important to the client, that Court's Opinion collides with the fundamental principle of the

American system of justice – that communications between attorney and client are privileged. The Third Circuit has gutted this fundamental principle in favor of expanded prosecutorial power.

The Third Circuit's decision will have far-reaching effects by impeding an attorney's ability to engage in frank discussions with his clients, thereby impairing his ability to provide effective representation. The enunciated rule penalizes the diligent attorney who properly counsels his client regarding compliance with a grand jury subpoena by opening that advice to be used against his client. Such a rule of disclosure would encourage counsel not to render advice or a client not to seek counsel. Surely this cannot be the intended result of the decisions below. Allowing the Third Circuit's decision to stand will have a chilling effect upon the attorney-client relationship in the criminal context and will significantly alter the balance between disclosure and privilege.

Further, a client's constitutional rights initially are undermined by denying the client access to the purported facts offered *ex parte, in camera* by the Government to circumvent the attorney-client privilege and again are compromised by denying the client access to the legal analysis upon which the lower courts vitiated the client's claim of attorney-client privilege.

I. The Conflict Among the Circuit Courts as to when the Crime-Fraud Exception Applies Has a Chilling Effect on Important Constitutional Rights

A. The Attorney-Client Privilege

Under the federal common law of privileges established by Rule 501 of the Federal Rules of Evidence for the

adjudication of federal rights, the central purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is "rooted in the imperative need for confidence and trust" between client and attorney, without which the client is not likely to reveal facts that may be deeply embarrassing or incriminating. *Trammel v. United States*, 445 U.S. 40, 51 (1980). Because of the importance of this privilege, it is "not only an interest long recognized by society *but one traditionally deemed worthy of maximum legal protection.*" *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (emphasis supplied). The attorney-client privilege is particularly significant in the criminal context.

B. The Work Product Privilege

The genesis of the attorney work product doctrine is this Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), where this Court recognized the "general policy against invading the privacy of an attorney's course of preparation," based on the need "that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510-11. In *Hickman*, this Court noted that work product includes "written materials obtained or prepared by an adversary's counsel with an eye toward litigation" and is reflected in "interviews, statements, memoranda, correspondence, briefs, and countless other tangible and intangible ways." *Id.*

C. The Crime-Fraud Exception

As important as they are, the attorney-client and work product privileges are not absolute, and may be held to be inapplicable where counsel's advice is sought *in furtherance* of a crime. *United States v. Zolin*, 491 U.S. 554 (1989). As this Court noted in *Zolin*:

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection – the centrality of open client and attorney communication to the proper functioning of our adversary system of justice – "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy" between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime.

Id. at 562-63 (citations omitted). The predicate for the crime-fraud exception thus is that there is no legitimate public interest in affording protection to communications between client and counsel actually used to help perpetrate a crime or fraud.

Ideally clients seek legal advice in an effort to avoid legal pitfalls, in advance of actions. In light of this, the Second Circuit has explained the importance, in the crime-fraud analysis, of finding evidence that the client's criminal intent was formulated *before* the communication in question:

> [t]he attorney-client privilege *is strongest where a client seeks counsel's advice to determine the*

> *legality of conduct before taking action.* With strong emphasis on intent, the crime-fraud exception applies "only where there is probable cause to believe that the communications with counsel *were intended in some way to facilitate or to conceal the criminal activity.*" It is therefore relevant to show that the wrong-doer had set upon a criminal course *before* consulting counsel.

United States v. Jacobs, 117 F.3d 82, 88 (2d Cir. 1997) (emphasis supplied) (internal citations omitted).

There is a clear conflict among the Circuits, however, both as to exactly what level of proof is necessary to establish that the crime-fraud exception trumps the attorney-client privilege in any given case and as to whether proof of *intent* to commit a crime is required *at the time of* the communication. This Court itself recognized the lack of a uniform standard of proof in *Zolin*, but left the issue unresolved. *United States v. Zolin*, 491 U.S. 554, 565 (1989) (the quantum of proof needed to establish admissibility remains subject to question). In fact, in *Zolin*, this Court acknowledged the statement in the 1933 United States Supreme Court case *Clark v. United States*, that a "*prima facie*" case was the necessary showing, "has caused some confusion." *Id. See also In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005); *Intervenor v. United States (In re Grand Jury Subpoenas)*, 144 F.3d 653, 660 (10th Cir. 1998) (the exact quantum of proof necessary to meet the *prima facie* standard has not been decided by the United States Supreme Court); *In re Bankamerica Corp. Secs. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001) (a number of circuits have adopted different standards regarding the level of proof required to satisfy the crime-fraud exception, an issue the Supreme Court did not reach in *Zolin*).

Saying that the government must make a *prima facie* showing that the crime-fraud exception applies begs the question, since it does not articulate a standard of proof. The result has been an erosion of an important individual right upon application of varying, subjective and amorphous standards throughout the circuits.

Since there has been no clear direction from this Court, it is not surprising that there is no consensus among the Circuits as to the *standard of proof* applicable to determinations of whether the crime-fraud exception applies or even as to the precise elements of the crime-fraud exception. This Court must grant certiorari on this very important issue in order to remedy the confusion created by this Court's use of the phrase "*prima facie* case" long ago in *Clark v. United States*, 289 U.S. 1 (1933), and to harmonize the different standards of proof used by the Circuit Courts on this issue.

D. The Conflict Between the Circuits Regarding the *Prima Facie* Standard

In applying the crime-fraud exception and defining what constitutes a *prima facie* case, the Circuits are divided.

1. *Prima Facie* Construed as "Reasonable Cause": The First, Second, Sixth and Ninth Circuits

While acknowledging that the "*prima facie*" concept "is among the *most rubbery* of all legal phrases" and "usually means little more than a showing of *whatever is required* to permit some *inferential leap* sufficient to reach a particular outcome," *In re Grand Jury Proceedings*, 417

F.3d 18, 22-23 (1st Cir. 2005) (emphasis supplied), the First Circuit has interpreted *prima facie* as a "reasonable cause" standard. That Circuit has attempted to further refine the standard by stating that "neither speculation nor evidence that shows only a distant likelihood of corruption is enough." *Id.* at 23.

The Second, Sixth and Ninth Circuits have applied similar "probable cause" or "reasonable cause" standards. *See In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995); *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *In re Antitrust Grand Jury*, 805 F.2d 155, 166 (6th Cir. 1986); *In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377, 381 (9th Cir. 1996). The Sixth Circuit has articulated the "level of proof" it requires as: "evidence . . . that 'a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud.'" *United States v. Collis*, 128 F.3d 313, 321 (6th Cir. 1997) (quoting *In re Antitrust Grand Jury*, 805 F.2d at 166). The Ninth Circuit has translated this to mean "*more than a suspicion*, but less than a preponderance of the evidence." *United States v. Tei Fu Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (emphasis supplied).

2. *Prima Facie* Construed as an "If Believed" Standard: The Third, Eleventh and D.C. Circuits

In an implicit acknowledgement of the vagueness of the *prima facie* "standard of proof," the Third, Eleventh and D.C. Circuits have interpreted *prima facie* in the context of the crime-fraud exception to mean evidence that "*if believed*" by the trier of fact would establish the elements of an ongoing or imminent crime or fraud. *Haines v. Liggett Group Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992); *In re*

Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987); and *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997). The actual application of this "standard," and even the underlying elements to which the standard is applied, are different even among these Circuits. (See *infra*).

3. *Prima Facie* Means the Burden of Going Forward: The Fourth, Fifth and Seventh Circuits

Perhaps unwittingly, the Fourth and Fifth Circuits have acknowledged *prima facie* is a reference to the *burden of going forward*, not a *standard of proof*. The Fifth Circuit has found that *prima facie* means evidence "such as will suffice" *until contradicted* and overcome by other evidence; in other words, sufficient evidence to satisfy the burden of going forward. *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982). The Fourth Circuit has held that to satisfy the *prima facie* "standard," the proof "must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted." *United States v. Under Seal (In re Grand Jury Proceedings #5)*, 401 F.3d 247, 251 (4th Cir. 2005). Further, that Circuit held that "while such a showing may justify a finding in favor of the offering party, it does not necessarily compel such a finding." *Id.* The Fourth Circuit also specifically has noted that "proof either by a preponderance or beyond a reasonable doubt of the crime or fraud is not required." *Id.* Similarly, the "standard" applied by the Seventh Circuit is whether the evidence "calls for an inquiry," and thus, makes out the proponent's case only if unrebutted. The

Court in *In re Feldberg*, 862 F.2d 622 (7th Cir. 1988), explained the concept of *prima facie* as follows:

> Courts often use 'prima facie evidence' to refer to *enough to require explanation* rather than evidence that by itself satisfies a more-likely-than-not standard. One need only think of litigation about claims of racial or age discrimination, in which most of those who satisfy the lax standards of a prima facie case go on to lose on the merits. Here, as in the law of discrimination, a prima facie case must be defined with regard to its function: *to require the adverse party*, the one with superior access to the evidence and in the best position to explain things, *to come forward with that explanation*. If the court finds the explanation satisfactory, the privilege remains.

Id. at 626 (emphasis supplied) (internal citations omitted). *See also United States v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993) (*prima facie* case is made where evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege).

Ironically, unlike *In re Feldberg*, in this case because Jane Doe was not privy to the government's purported evidence, it was the government, not "the adverse party," (that is, Jane Doe), which had "superior access to the evidence."

4. No Standard of Proof: The Eighth and Tenth Circuits

The Eighth Circuit has not articulated a standard of proof but merely has stated that "a party seeking discovery of privileged communications based upon the

crime-fraud exception must make a *threshold showing* 'that the legal advice was obtained in furtherance of the fraudulent activity and was closely related to it.'" *In re Bankamerica Corp. Secs. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001) (quoting *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 (8th Cir. 1984)). Similarly, in *Intervenor v. United States (In re Grand Jury Subpoenas)*, 144 F.3d 653 (10th Cir. 1998), the Tenth Circuit, under the facts of that case, stated:

> [a]lthough the exact quantum of proof necessary to meet the *prima facie* standard has not been decided by the Supreme Court, several circuits have attempted to define precisely what the standard requires. We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a *prima facie* showing.

Id. at 660 (internal citations omitted).

E. The Conflict Among the Circuits as to Whether Proof of Intent to Use an Otherwise Privileged Communication in Furtherance of a Crime Is Required

1. Intent Required: The First, Second, Fifth, Eighth and D.C. Circuits

The First, Second, Fifth, Eighth and D.C. Circuits specifically have held that the crime-fraud exception to the attorney-client privilege cannot be established by showing *a mere coincidence* in time between an otherwise privileged communication and criminal activity. These Circuits specifically have required proof that the communications with counsel were *intended* in some way to further that activity. *In re Grand Jury Subpoenas Duces Tecum*, 798

F.2d 32, 34 (2d Cir. 1986) (finding a mere temporal nexus between the alleged crime and the attorney communication insufficient to support a finding that those communications were in furtherance of the crime); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1243 (5th Cir. 1982) (requiring proof of specific intent by client in the development of the work product documents); *In re Grand Jury Subpoenas*, 773 F.2d 204, 207 (8th Cir. 1985) (finding that the question of intent in the context of the crime-fraud exception cannot be ignored; mere coincidences in the physical evidence cannot form the basis for application of the crime or fraud exception to the attorney-client and work product privileges); *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (to subject attorney-client communication to disclosure, it must have been made with an intent to further a crime or fraud); *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005) (neither speculation nor evidence that shows only a distant likelihood of corruption is enough).

Specifically, the First Circuit has stated that there must be a reasonable basis to believe: (1) that the client *was engaged in* (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications *were intended* by the client to facilitate or conceal the criminal or fraudulent activity. *Id.* (emphasis supplied) (citing *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 75 (1st Cir. 1999)).

Similarly, the Second Circuit has held that the crime-fraud exception has a "narrow and precise" application. That is, "[t]o subject the attorney-client communications to disclosure, they must *actually* have been made with an

intent to further an unlawful act."[3] *United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) (emphasis supplied) (quoting *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989)); *see also In re Grand Jury Subpoenas*, 773 F.2d 204, 207 (8th Cir. 1985) (court agreed with district court that mere coincidence in time, without specific proof of intent, is insufficient to establish the applicability of the crime-fraud exception and therefore proof was too speculative); *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005) (temporal proximity is not enough).

The Court of Appeals for the D.C. Circuit sets forth somewhat different requirements to establish that the crime-fraud exception is met, but still have required specific proof of intent:

> First, the client must have made or received the otherwise privileged communication *with the intent* to further an unlawful or fraudulent act. Second, the client *must have carried out* the crime or fraud. In other words, the exception does not apply even though, at one time, the client had bad intentions.

In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) (emphasis supplied) (citing *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989)).

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[3] Notwithstanding this clearly anticipated requirement of intent, the Second Circuit *also* has required only "'a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.'" *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997) (quoting *In re John Doe*, 13 F.3d 633, 637 (2d Cir. 1994)).

Among those Circuits requiring proof of the intent to use the communication in furtherance of the crime or fraud, there is a critical inconsistency between this requirement and the standard of proof. For example, the Second Circuit's requirement of *actual intent* necessitates a level of certainty that is not guaranteed by the lax reasonable cause standard. The question to this Court, then, is how does a party make a showing of "actual intent" without some articulated burden of proof, as described above?

2. No Intent Required: The Third, Fourth, Sixth and Eleventh Circuits

Other Circuits do not appear to require specific proof of intent and, in fact, set forth differing elements for the crime-fraud analysis. The Third Circuit has applied its interpretation of the *prima facie* "standard" ("if believed") to two prongs of the crime-fraud analysis, which it has articulated as: "1) the client *was committing or intending* to commit *a fraud or crime*; and 2) the attorney-client communications were *in furtherance* of that alleged crime or fraud." *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000) (internal citations omitted) (emphasis supplied).

The Fourth Circuit has articulated the elements of the crime-fraud exception as follows:

> the party invoking the crime-fraud exception must make a *prima facie* showing that (1) the client was *engaged in or planning* a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear a

> *close relationship* to the client's existing or future scheme to commit a crime or fraud.

United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 251 (4th Cir. 2005) (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999) (emphasis supplied)). To further compound the confusion and despite the manner in which it defined *prima facie*, above, the Fourth Circuit *in the same case* found that "[p]rong one of [the crime-fraud] test is satisfied by a *prima facie* showing of evidence that, *if believed* by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." *Id.* (citing *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223 (11th Cir. 1987) (emphasis supplied); *see also In re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982)). On the other hand, the Fourth Circuit only has required that the second prong "be satisfied with a showing of a close relationship between the attorney-client communications and the possible criminal or fraudulent activity." *United States v. Under Seal (In re Grand Jury Proceedings #5)*, 401 F.3d 247, 251 (4th Cir. 2005) (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999)). The Fourth Circuit's second prong is in conflict with the Third Circuit's requirement that the communication or documents be "in furtherance of" and not merely "related to." *In re Grand Jury Investigation*, 445 F.3d 266, 277 (3d Cir. 2006) (see *infra*).

Like the Fourth Circuit, the Sixth Circuit has held that: "'First, the government must make a *prima facie* showing that a sufficiently serious *crime or fraud occurred* to defeat the privilege; second, the government must establish *some relationship* between the communication at issue and the *prima facie* violation.'" *United States v.*

Collis, 128 F.3d 313, 321 (6th Cir. 1997) (emphasis supplied) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 164 (6th Cir. 1986)).

The Eleventh Circuit, on the other hand, only has required proof with regard to the first prong of a similar crime-fraud analysis, which it articulates as: "the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice." *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987). The second prong of the crime-fraud analysis, the Eleventh Circuit has found, is satisfied by a showing that the communication is *related to* the criminal or fraudulent activity established under the first prong. *Id.* The standard of proof applicable to the second prong has not been clearly defined and does not appear to be subject to the *prima facie* "standard." *Id.* at 1226-27.

F. The Chilling Effect of the Third Circuit's Decision

In this case, the Third Circuit found that the government's "*prima facie*" showing that a crime had occurred *subsequent* to the attorney-client communication was sufficient to cause waiver of the attorney-client privilege. According to the Third Circuit, the *mere temporal coincidence* between the attorney-client communication and an alleged crime is sufficient to cause a waiver of that important privilege. If the Third Circuit decision is allowed to stand, the crime-fraud exception will eviscerate the attorney-client privilege in that Circuit. Moreover, as

demonstrated above, the Third Circuit's decision is in conflict with decisions of other Circuits, and particularly the First, Second, Fifth, Eighth and D.C. Circuits. In this case, there was no evidence that Jane Doe *actually intended* to use the attorney-client communication in furtherance of an alleged subsequent crime. The only evidence submitted (although, since Jane Doe has been denied access to the government's allegations, it is the only information that could exist) is after-the-fact, inherently ambiguous and could only make out a *prima facie* case through "some inferential leap," *In re Grand Jury Proceeding*, 417 F.3d 18, 22-23 (1st Cir. 2005), that is inappropriate when such an important right is at stake.

In its Opinion in this case, the Third Circuit glossed over the intent requirement of other Circuits and found that "[t]he temporal proximity of the ongoing deletion of emails after January 20 could be viewed as an additional indication that Jane Doe intended to use the information she gathered from the January 20 communication to further the scheme to obstruct." *In re Grand Jury Investigation*, 445 F.3d 266, 279 (3d Cir. 2006). Despite the Court's use of the phrase "an additional indication that Jane Doe intended," there was simply no evidence – and clearly none referenced anywhere in its Opinion by the Third Circuit – that Jane Doe had any intent to commit a crime before or during her communication with counsel. In effect acknowledging that there was no evidence of criminal intent *at the time of* the subject communication, the Third Circuit held: " . . . if Jane Doe learned of the Government's interest in certain documents from her conversation with Attorney on January 20, 2005 *and subsequently* acquiesced in the deletion or destruction of those documents, the second prong of the crime-fraud

exception would be satisfied." *Id.* (emphasis supplied). Clearly this holding is in direct conflict with the decisions of the First, Second, Fifth, Eighth and D.C. Circuits. *See e.g., United States v. Jacobs*, 117 F.3d 82 (2d Cir. 1997); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32 (2d Cir. 1986).

The Third Circuit's ruling will definitively but unnecessarily have a chilling effect on the attorney-client relationship. The Third Circuit's holding is based on the obviously faulty premise that because her attorney advised Jane Doe as to how *to properly comply* with the law, that advice must have been used by Jane Doe in the subsequent alleged obstruction of justice. This same facile analysis may be used to justify application of the crime-fraud exception in any circumstances when the government makes a *"prima facie"* showing of alleged criminal activity after a consultation.[4] In the wake of the Third Circuit's decision, prudent attorneys may simply refuse to accept service of subpoenas on behalf of their clients and to decline counseling their clients regarding such subpoenas for fear that they will be called in to testify against their own clients.

Similarly, clients who are uncertain of the confidentiality of their communications simply will not seek advice and will not disclose information their lawyers need to know, again placing in peril the fair administration of justice. This defeats what this Court articulated in *Zolin*

[4] At oral argument of this matter, the Third Circuit in addressing the Assistant United States Attorney specifically noted the great potential for a slippery slope in this context.

as "the centrality of open client and attorney communication to the proper functioning of our adversary system of justice." *Zolin* at 562-63. As this Court admonished in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393.

This matter warrants review by this Court to reverse the chilling effect of the Third Circuit's decision on the attorney-client relationship.

II. Jane Doe was Denied the Opportunity to Effectively Challenge the Application of the Crime-Fraud Exception in this Case

The Third Circuit's decision also violates basic, well-established notions of due process afforded by the Fourteenth Amendment. In this case, Jane Doe was denied the opportunity to rebut whatever the government's *prima facie* case was because critical information about the "case" was withheld from her and her counsel. In fact, the only version of a critical district court opinion which Jane Doe received was so severely redacted that key portions of the opinion including, but not limited to, those pages which revealed the specific factual premises for that court's conclusions as to the applicability of the crime-fraud exception to the attorney-client privilege, were omitted entirely. Indeed, the opinion Jane Doe received was so extensively redacted that it was – and currently is – virtually impossible for Jane Doe to discern the basis for the District Court's conclusion that the crime-fraud exception applies to the confidential communications at issue. App. at 33a-54a.

Upon receipt of the District Court's opinion, Jane Doe appealed to the Third Circuit seeking release of the full opinion from the District Court, but the Third Circuit denied Jane Doe's request. By permitting such redaction, the Third Circuit has given its blessing to a clear due process violation and has permitted substantial deprivation of Jane Doe's opportunity to be heard in a meaningful manner.

The requirement of a fair hearing is not satisfied, of course, by a shell or facade. The hearing must be meaningful. In particular, a party must not, through no fault of his own, be precluded from arguing the merits of his case. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The essence of a meaningful hearing lies in a party's ability to present evidence supportive of her arguments in the case. A party barred from seeking critical evidence does not, of course, have to show that the evidence, if admitted, would lead to a successful outcome for that party. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 512, 544 (1985). But the requirement of a "meaningful hearing" at least means that a party must not be pushed into the ring blind-folded with one hand tied behind its back.

The requirements of due process vary with the circumstances of the proceeding. *See, e.g., Hannah v. Larche*, 363 U.S. 420, 441-42 (1960). Grand jury proceedings are unique proceedings with their own set of rules, to be certain. But even in the context of a grand jury proceeding, some notion of due process must apply, lest the playing field will be entirely lopsided and the government will be assured victory in each and every case. In this case, the Third Circuit Court of Appeals has supported the U.S. Attorney's use of secrecy of the Grand Jury as a sword

(rather than as a shield) to permit the government to defeat Jane Doe's fundamental rights by neutralizing her ability to address the specific grounds asserted by the government as reasons for defeating her rights. If the information on which the District Court based its decision is not fully disclosed, Jane Doe will forfeit her right to have an attorney defend her assertion of her privileges.

Most troubling of all, of course, is the fact that if the full opinion is not released, the Government will have had free rein to present testimony in support of its claim that the crime-fraud exception should apply without any meaningful check or balance from the other interested party. It is difficult to conceive of a more blatant interference with due process rights than to allow such a privilege to be vitiated based on one-sided evidence which, for all Jane Doe knows, may not even be accurate, credible or true, the interpretation of which has been presented in a fashion to reflect the government's bias or objective.

Clearly, Jane Doe's constitutional rights have been completely undermined by being prohibited from fully reviewing the legal analysis upon which the District Court vitiated her claim of attorney-client privilege. That the factual underpinnings of a decision that directly impacts her individual rights were intentionally kept from her gives rise, at the very least, to the "appearance of impropriety." In effect, Jane Doe has been denied the right to observe the very analysis she seeks to challenge. Application of the so-called "crime-fraud exception" to the attorney-client and work product privileges requires a case-by-case factual analysis; hence, without access to the full opinion, Jane Doe has no effective opportunity to test the applicability of the privilege to her case. Moreover, Jane Doe has been denied the opportunity to distinguish, on

their facts, previous cases decided by this Court and the Circuits in which the crime-fraud exception has been held to apply.

Hence, application of well-settled notions of due process compel the conclusion that the Third Circuit's decision be reversed and that the opinion which pertains to the crime-fraud exception be released in full, unfettered form.

CONCLUSION

As outlined in great detail above, there is a distinct conflict among the Circuits as to the quantum of proof necessary to establish the applicability of the crime-fraud exception. This Court should take this appeal to develop a uniform standard that delineates what the Government must prove to properly invoke the crime-fraud exception.

Further, to add insult to injury, a client's constitutional rights initially are undermined by denying the client access to the purported facts offered by the Government to circumvent the attorney-client privilege and again are compromised by denying the client access to the legal analysis upon which the lower courts vitiated the client's claim of attorney-client privilege. This Court should remedy that injustice.

The judgment of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

Appendix A – Third Circuit Court of Appeals Opinion, dated April 21, 2006 ..... 1a

Appendix B – Third Circuit Court of Appeals Judgment, dated April 21, 2006 ..... 29a

Appendix C – Third Circuit Court of Appeals Order, dated February 9, 2006 ..... 31a

Appendix D – Judge Davis Opinion and Order, dated February 1, 2006 [black out denotes original redaction by court] 33a

Appendix E – Third Circuit Court of Appeals Order, dated May 19, 2006 ..... 56a

Appendix F – Subpoena to Testify Before Grand Jury, dated March 1, 2005 [as originally redacted] 58a

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1474

IN RE: GRAND JURY INVESTIGATION*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 03-gj-00123-07)
District Judge: Hon. Legrome D. Davis

Argued March 9, 2006

Before: SLOVITER, AMBRO and NYGAARD,
Circuit Judges

(Filed: April 21, 2006)

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* Cite as *In Re: Grand Jury Investigation*, No. 06-1474.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

I.

This matter is before us in the context of an ongoing grand jury investigation of suspected federal criminal activity. To maintain the confidentiality of the investigation, we will refer only to such facts as have been made public by the Assistant U.S. Attorney. Indeed, this panel has not been made aware of the facts in the underlying investigation, nor need we be in order to decide the issues before us. Moreover, because the grand jury is impaneled for only a limited lifetime, we must act expeditiously and limit our analysis to the issues directly before us without digression.

II.

In late 2003, a grand jury began investigating the financial arrangements and business dealings of the individual who we believe *may* be the Primary Target. Some of his business dealings have apparently been

carried out by an entity we call, for want of a better designation, the Organization. The grand jury investigation led to inquiry of Jane Doe, the Executive Director of the Organization, who had, and has, intimate knowledge of and access to the papers and other material of both the Primary Target and the Organization. It appears that Jane Doe is also a target of the grand jury investigation. If she was not at the outset, she certainly has become a target in light of the events with which we are concerned. The Organization, through its counsel ("Attorney"), has entered into a joint-defense agreement with Jane Doe and her counsel in response to the investigation.

On April 27, 2004, the Government issued a grand jury subpoena to the Organization. It requested all documents, including email, from January 1, 1996 to the present, concerning, inter alia: the Organization's document retention and destruction policy; the payment of certain expenses, contributions, or donations to the Primary Target; and all grants, contributions, or donations to the Primary Target. Attorney produced a large number of documents on behalf of the Organization in response to the subpoena. These are not at issue here.

The Government was unsatisfied with the document production, particularly with respect to what it perceived as the Organization's failure to search for and produce email stored on the Organization's computer hard drives. On January 18, 2005, the Government issued a second subpoena to the Organization, requesting essentially the same documents as in its previous subpoena. In a letter dated January 19, 2005, the Government notified Attorney that it wished to have FBI and IRS experts perform a scan of the Organization's computers to recover stored information, including deleted email files.

On February 10, 2005, pursuant to an agreement among the parties, an FBI computer technician went to the Organization's place of business and "imaged" the hard drive on Jane Doe's computer. The Government thus made an exact copy of the contents of the hard drive, including deleted email files. It uncovered numerous stored messages which could be construed to show a conscious effort by the Organization's staff to destroy emails.

Concerned about the potential obstruction of justice by Jane Doe and others at the Organization, the Government issued a subpoena duces tecum to Attorney on March 1, 2005. It sought to compel grand jury testimony regarding his discussions with Jane Doe as to her compliance (or apparent non-compliance) with the prior subpoenas for production of the Organization's email. The Government also sought production of Attorney's notes concerning his conversation with Jane Doe regarding the Organization's compliance with the two grand jury subpoenas and the January 19, 2005, letter. On March 10, 2005, the Government issued a separate subpoena for production of documents to the custodian of records at Attorney's law firm.

The Government, Attorney and Jane Doe then sought to reach an agreement that would limit the scope of Attorney's testimony before the grand jury. The Government proposed that Attorney testify on five subjects: (1) that he represents the Organization in connection with the April 27, 2004, and January 18, 2005, subpoenas; (2) that he received the January 18, 2005, subpoena and January 19 letter from the Government; (3) that he informed Jane Doe by telephone on January 20, 2005, of his receipt of the January 18 subpoena; (4) that he faxed a cover letter to Jane Doe enclosing the cover letter and subpoena from the Government; and (5) that he advised Jane Doe on January

20 regarding how to comply with the subpoena. Jane Doe voiced no objection to subjects (1) - (4), but she challenged number (5), claiming that Attorney's advice regarding compliance with the subpoena is privileged.

On January 4, 2006, the Government filed a motion to enforce the subpoena and to compel Attorney's testimony. Attorney and Jane Doe were permitted to intervene with regard to the motion, and they filed a motion to quash or to modify the subpoena to the extent that it required disclosure of privileged information.

On January 17, 2006, the District Court held a closed-court hearing on the motions. The Government argued that the crime-fraud exception should overcome the claim of privilege. In support of its position, it submitted an ex parte affidavit from an FBI agent with knowledge of the evidence gathered in the investigation. The District Court also heard testimony from Attorney and from Jane Doe's Attorney (hereinafter "Doe's Attorney"). With the Government absent from the courtroom, the two Attorneys testified essentially to their recollection of the conversations with Jane Doe on January 20, 2005, after receipt of the second subpoena and the Government's cover letter.

The dispute before the District Court was limited to whether Attorney should be compelled to reveal the substance of his January 20, 2005, telephone conversation with Jane Doe and to produce his handwritten notes concerning that conversation. On February 1, 2006, the District Court granted the Government's motion to enforce its subpoena. The Court concluded that although Attorney's advice regarding the subpoena is protected by the attorney-client privilege, and his notes are covered by the work-product doctrine, disclosure was appropriate in light

of the crime-fraud exception. Based on its review of the Government's ex parte affidavit, the District Court found sufficient evidence that Jane Doe was in the process of committing obstruction of justice at the time of her January 20 conversation with Attorney, and used the information provided by Attorney in furtherance of the crime.

The Government promptly scheduled Attorney's appearance before the grand jury. The District Court denied a stay pending appeal. Jane Doe timely appealed, and this court also denied a stay. On February 7, 2006, Attorney provided the requested documents and testified before the grand jury.

III.

A. Mootness

The Government argues that this court cannot grant any effective relief to Jane Doe because Attorney has testified and the documents it requested have been produced. The appeal, the Government states, is moot and should be dismissed. It relies for support on *Church of Scientology v. United States*, in which the Supreme Court stated that federal courts are not empowered "'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them].'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The Court explained that if an event occurs during the pendency of an appeal which makes it impossible for the court to render the prevailing party "any effectual relief whatever," the appeal must be dismissed as moot. *Id.* (quotation marks and citation omitted).

The Court noted, however, that if there is some means by which the court can effectuate even a partial remedy, the case remains a live controversy. *See id.* at 13. Based on that language, Jane Doe responds to the Government's suggestion of mootness by arguing that she is not without a remedy because "the true harm, which is in the indictment, has not yet occurred." Appellant's Br. at 20. Jane Doe recognizes that the remedy she initially requested, i.e., the quashing of the subpoena directed to Attorney, is no longer available, but she posits a number of remedies that this court could grant. Therefore, she argues, this is not a case where, in the language of *Scientology*, it is impossible for us to grant her "any effectual relief whatever."

Turning first to the documents, Jane Doe argues that this court could direct the District Court to order the return of Attorney's notes of the conversation he had with Jane Doe on January 20, documents he turned over pursuant to the grand jury subpoenas. This was a remedy expressly recognized by the Supreme Court in *Scientology*. In that case, a district court ordered a state-court clerk to comply with an IRS civil summons requesting the production of two tape-recorded conversations between officials of the Church of Scientology and their attorneys. The Church timely appealed enforcement of the subpoena but its request for a stay was denied, and the tapes were produced during the appeal. The Court of Appeals concluded that the appeal was moot because the IRS had already obtained the tapes, but the Supreme Court rejected that conclusion. It observed that while the Court of Appeals could not return the parties to the status quo ante, it could effectuate a partial remedy by ordering the Government to destroy or return any and all copies of the tapes in its

possession. The Court stated, "When the Government has obtained . . . materials as a result of an unlawful summons, . . . a court can effectuate relief by ordering the Government to return the records." *Id.* at 13.

The notes Attorney produced to the grand jury are tangible property, like the audio tapes. Therefore, this court can fashion a meaningful remedy for the allegedly unlawful subpoena by ordering a return of Attorney's notes to Attorney at his request if we decide the notes are privileged.[1]

Other Courts of Appeals have held that the availability of a direction to the grand jury to return notes or documents precludes a finding of mootness. *See In re Grand Jury Subpoenas (Stover)*, 40 F.3d 1096, 1100 (10th Cir. 1994) (applying *Scientology* in grand jury context and holding that refusal to quash subpoena duces tecum was not moot because court could order return or destruction of produced documents); *see also In re Arbitration (Security Life Ins.)*, 228 F.3d 865, 870 (8th Cir. 2000) (dismissing as moot portion of appeal concerning enforcement of subpoena for testimony, but hearing appeal regarding production of documents); *United States v. Florida Azalea Specialists*, 19 F.3d 620, 622 (11th Cir. 1994) ("[T]his appeal is not moot because if we hold that the subpoena was improperly issued, Florida Azalea would be entitled to a partial remedy in the form of return or destruction of its documents.").

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[1] We believe this would provide some measure of relief to Jane Doe, analogous to that provided in *Scientology*, insofar as the grand jury would no longer have access to the information contained therein.

The Government does not make any effort to distinguish these cases, and we do not understand it to dispute Jane Doe's argument that the case is not moot, at least insofar as the documents are concerned. We therefore conclude that the availability of an order directing the grand jury to return Attorney's notes precludes any finding that this appeal is moot, at least with respect to the documents.

The more difficult issue is whether the appeal is moot with respect to Attorney's testimony regarding the contents of his January 20 conversation with Jane Doe. Jane Doe suggests that an instruction could be given to the grand jury to disregard Attorney's testimony and that would constitute "effective relief" which prevents the appeal from being moot. She argues that federal courts have the power to instruct the grand jurors that they must disregard evidence previously presented to them. We recognize that is the remedy frequently used by trial courts when jurors are exposed to testimony that was not admissible. *See, e.g., United States v. De Jesus Mateo*, 373 F.3d 70, 73 (1st Cir. 2004) ("Within wide margins, the prejudice caused by improper testimony can be addressed by providing appropriate curative instructions.") (citation omitted). On the other hand, courts' control over a grand jury is significantly more limited than their control over a trial jury. In any event, we will assume arguendo that a curative instruction would be a possible result in an appropriate case.

The Government relies heavily upon *In re Grand Jury Proceedings (John Roe)*, 142 F.3d 1416 (11th Cir. 1998), where, as here, an attorney testified in response to a subpoena prior to resolution of the clients' appeal and prior to issuance of an indictment. *Id.* at 1420. The clients

argued the appeal was not moot because the court could either enjoin the grand jury from considering the attorney's testimony or it could dismiss the grand jury. *Id.* at 1423. The court held that the appeal was moot, distinguishing *Scientology* because the subpoena there was for the production of tangible physical property (audio tapes), whereas the subpoena under review sought "intangible witness testimony." *Id.* at 1422. The court noted that *Scientology* did not involve grand jury proceedings, the independence and secrecy of which limit the availability of effective relief. *Id.* at 1422-23.

The Eleventh Circuit rejected the option of dismissing the grand jury as a remedy, noting that it could not prevent the Government from presenting the testimony to another grand jury. Jane Doe has also suggested that we could circumvent mootness by ordering the impaneling of a new grand jury. We reject that course and agree with the Eleventh Circuit that dismissal of the grand jury is not an appropriate remedy, at least in this case. Even if this court could provide that remedy, we find apt the Eleventh Circuit's observation in *In re Grand Jury Proceedings (John Roe)* that dismissing the grand jury would not "erase the attorney's testimony from the mind of the United States Attorney and others having access to the testimony." *Id.* at 1427. As such, ordering the impaneling of a new grand jury would not constitute "effectual relief," *Scientology*, 506 U.S. at 12, because it would do nothing to prevent the Government from using the testimony again.[2]

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[2] The Tenth Circuit has suggested, in dictum, that a court can discharge a grand jury and empanel a new one "if the taint were serious enough." *In re Grand Jury Subpoenas (Stover)*, 40 F.3d 1096, 1100 n.2 (10th Cir. 1994). The court did not explain the basis for its belief that such a remedy would be proper. Moreover, it does not appear that any

(Continued on following page)

In any event, that is much too draconian a remedy for the situation presented here.

What Jane Doe really seeks, therefore, is an order that prevents any future use of Attorney's testimony. The Eleventh Circuit rejected a future-use injunction as a remedy stating that it would be unenforceable. *In re Grand Jury Proceedings (John Roe)*, 142 F.3d at 1428; *see also Office of Thrift Supervision, Dep't of Treasury v. Dobbs*, 931 F.2d 956, 959 (D.C. Cir. 1991) ("[A] party cannot retrieve testimony once it is given; the party can only ask that the testimony be sealed against future use. In that event, such a challenge would be ripe only at the time when that future use is a real, not a speculative, possibility. Because appellant seeks only to seal his testimony against future use, we find that his appeal became moot upon his compliance with the district court's order enforcing the subpoena.") (citations omitted).

We are not convinced that we should rule out the possibility of a future-use injunction as a remedy. Although this court has not addressed whether a future-use injunction would be appropriate in the grand jury context, we have held that future-use injunctions can be entered in response to an unlawful IRS civil summons. In *Gluck v. United States*, 771 F.2d 750 (3d Cir. 1985), we held that an appeal from enforcement of a summons was not moot even though the appellant had complied with the summons by providing the requested documents. We explained that "the surrendering of the documents to the IRS does not end the controversy between the parties because, if we

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court has actually gone so far as to discharge a grand jury in face of an unlawful subpoena.

find that the summonses were illegal, we can still fashion a remedy – *prohibition of the use of the summoned documents* – to afford [Appellants] effective relief." *Id.* at 754 (emphasis added). The *Gluck* decision relied upon *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976), where we held that an appeal from enforcement of a subpoena duces tecum was not moot despite subsequent compliance. We observed that,

> [i]f the taxpayers were to prevail in their contention that all summonses were illegal because they were issued solely to gather evidence for use in a criminal prosecution, then the records acquired from Friedman would have been obtained unlawfully. Such a ruling could affect the possible use of these records in any subsequent criminal or civil proceeding brought against the taxpayers.

Id. at 931; see also *United States v. Waltman*, 525 F.2d 371, 373 n. 1 (3d Cir. 1975) (holding that surrender of a personal diary in response to subpoena did not moot appeal because "if the diary is not a corporate record, the individual respondent is entitled to its return and appropriate suppression of the use of its contents"). As the D.C. Circuit Court of Appeals has put it, "[t]he Third Circuit's approach implies that no subpoena case is moot so long as the court can provide redress by sealing documents or testimony against future use." *Office of Thrift Supervision*, 931 F.2d at 959.

We do not need to decide at this time whether we should or could issue a future-use injunction. We follow the example of the Supreme Court in *Scientology* where, after holding that a return or destruction of the audio tapes at issue provided an effective remedy, the Court

declined to address whether a future-use injunction would also be an effective remedy. The Court explained,

> Petitioner also argues that a court can effectuate further relief by ordering the IRS to refrain from any future use of the information that it has derived from the tapes. Such an order would obviously go further towards returning the parties to the *status quo ante* than merely requiring the IRS to return the tapes and all copies thereof. However, as there is no guarantee that the IRS will in fact use the information gleaned from the tapes, it could be argued that such an order would be an impermissible advisory opinion. Because we are concerned only with the question whether *any* relief can be ordered, we leave the "future use" question for another day.

506 U.S. at 13 n. 6 (citations omitted).

Similarly, it is not clear that the U.S. Attorney plans to use Attorney's testimony as the basis for a still unissued indictment or in any criminal proceeding. Under these circumstances, we need not decide whether we will extend our jurisprudence to the grand jury context. As in *Scientology*, the potential availability of a future-use injunction means that the issue is not moot. We thus reject the Government's suggestion that this appeal is moot.

B. Merits

We now turn to the merits of Jane Doe's appeal. She argues that the District Court's order enforcing and refusing to quash the subpoena to Attorney undermines the attorney-client privilege because the subpoena seeks to ascertain the contents of her conversation with Attorney on January 20, 2005. Although Jane Doe retained a

personal lawyer, her lawyer and Attorney (who represents the Organization) entered into a joint defense agreement, and therefore the attorney-client privilege is applicable. In any event, the Supreme Court has held that communication between a corporation's counsel and the employees of the corporation are covered by the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

The Court stated that the attorney-client privilege is the "oldest of the privileges for confidential communications known." *Id.* at 389. "[C]ourts long have viewed [the privilege's] central concern as one 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn*, 449 U.S. at 389).

Despite the importance of the attorney-client privilege in the administration of justice, the Supreme Court in *Zolin* commented on the costs of the privilege in that it "'has the effect of withholding relevant information from the factfinder.'" *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). Therefore, the privilege can be overridden if the client used the lawyer's services to further a continuing or future crime or fraud. *See In Re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979).

Jane Doe argues that the crime-fraud exception is inapplicable in this case because she did not initiate the communication with Attorney or solicit any advice. She relies on the language in *Doe*, where this court stated, "[o]nly when a client knowingly seeks legal counsel to further a continuing or future crime does the crime-fraud

exception apply." *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005).

That sentence in the *Doe* opinion reflects the facts in that case, i.e., the client, a law enforcement officer, initiated the communication with the attorney and sought his advice as to how to circumvent the prohibition against investing in a witness's business. Nothing in that opinion, or in any opinion, suggests that the crime-fraud exception applies only if the client initiates the conversation.

To the contrary, the crime-fraud exception is equally applicable in situations where there has been a prior attorney-client relationship and the communication at issue was made in the context of that relationship. There would be no reason to limit the applicability of the crime-fraud exception to client-initiated contact, as the exception's purpose is to further frank and open exchanges between the client and his or her attorney, whether newly retained for purposes of the investigation or otherwise.

The burden to make the necessary showing for the crime-fraud exception falls on the party who seeks application of the exception. In criminal cases, it is the Government that seeks to invoke the crime-fraud exception to counter a defendant's effort to prevent disclosure of certain testimony or documents on the ground of the attorney-client privilege. Therefore, it is the Government that must bear the initial burden. We have described the showing that must be made as follows:

> [T]he government must make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud. A "prima facie showing"

> requires presentation of "evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met."

In re Grand Jury Subpoena, 223 F.3d 213, 217 (3d Cir. 2000) (citations omitted); *see also Impounded*, 241 F.3d 308, 317 (3d Cir. 2001); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992).

In *Clark v. United States*, 289 U.S. 1 (1933), the Supreme Court, in describing the evidentiary standard for the application of the crime-fraud exception, stated:

> There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in. . . .
>
> . . . To drive the [attorney-client] privilege away, there must be "something to give colour to the charge"; there must be "prima facie evidence that it has some foundation in fact." When that evidence is supplied, the seal of secrecy is broken.

Id. at 14-15 (citations and footnote omitted). The burden is not a particularly heavy one. As the Court of Appeals for the Seventh Circuit stated, prima facie evidence cannot mean "enough to support a verdict in favor of the person making the claim." *In re Feldberg*, 862 F.2d 622, 624 (7th Cir. 1985).

In this case, the District Court found that at the time of Jane Doe's January 20, 2005 conversation with Attorney, Jane Doe was committing the crime of obstruction of justice. The Court's finding that the Government met its burden of presenting evidence demonstrating a reasonable basis to suspect the perpetration of a crime, if based on

adequate evidence, satisfies the first prong of the crime-fraud exception.

The District Court based its finding on the evidence before it, which included the ex parte affidavit provided by the Government. The Supreme Court has made clear that the district courts may use ex parte evidence supplied by the Government in order to make the required findings. *Zolin*, 491 U.S. at 554.

In *Zolin*, the IRS sought to use two tape recordings produced in an earlier case to make the required showing that the crime-fraud exception overcame the claimed attorney-client privilege. The Court of Appeals for the Ninth Circuit had opined that the determination of the applicability of the crime-fraud exception must be based on "sources independent of the attorney-client communications recorded on the tapes." *Id.* at 561. In holding that was error, the Supreme Court stated that "a rigid independent evidence requirement does not comport with 'reason and experience,' . . . that *in camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception," and that the party opposing the privilege "must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *Id.* at 574-75.

In accordance with *Zolin*, the District Court here used the affidavit of the FBI agent to support its finding that at the time of Jane Doe's January 20, 2005 conversation with Attorney, Jane Doe was committing the crime of obstruction of justice by participating in a scheme to delete emails on the computers of the Organization, its officers, and staff. That this was the crime on which the Government

hinged its arguments with respect to the crime-fraud exception was made clear in the Assistant U.S. Attorney's arguments before this court.

In conducting our review of the District Court's finding, we too must base our decision on the evidence submitted to the District Court ex parte. We are hampered in articulating the basis for our conclusion by the need to keep the evidentiary support confidential because much of the relevant information that was before the District Court is sealed as it pertains to the ongoing investigation of the grand jury. Moreover, the parties' briefs have been sealed. We are therefore comfortable to discuss only such facts as the Assistant U.S. Attorney disclosed in his argument in open court before us.

Based on our review, we agree that there was sufficient evidence to support the District Court's finding that Jane Doe could be found to have engaged in the ongoing crime of obstruction of justice.[3] That does not mean we believe there is sufficient evidence to support a jury verdict to that effect beyond a reasonable doubt. However,

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[3] The Government apparently relies on 18 U.S.C. § 1519, which provides as follows:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

There are other provisions arguable applicable and we do not limit our analysis to Section 1519.

there is enough evidence to meet the first prong of the crime-fraud standard.

The second prong that the Government must satisfy, i.e., that the communication with the Attorney is, or was, in furtherance of the crime, requires a more subtle analysis. In holding that the Government had satisfied the second prong of the crime-fraud exception, the District Court initially stated that the attorney-client communication need only have been "related to" the ongoing crime. For that proposition, it cited to a recent Not Precedential Opinion ("NPO") of this court, *United States v. Paz*, 124 Fed. Appx. 743 (3d Cir. 2005) (per curiam), where the opinion states for the crime-fraud exception to apply "the Government must show that the attorney-client communications were related to this continuing or intended criminal activity." *Id.* at 746 (citing *In re Grand Jury Subpoena*, 223 F.3d at 217). The District Court erred in relying on a NPO.

Under this court's Internal Operating Procedures ("IOPs"), NPOs "are not regarded as precedents that bind the court because they do not circulate to the full court before filing." 3d. Cir. IOP 5.7 (July 1, 2002). *A fortiori*, they are not precedents for the district courts of this circuit. Although they have always been available to the public in binders held for that purpose in the Clerk's Office, and hence were not "secret" notwithstanding contrary characterization by members of the bar, academia, and the press, they are not precedential because they do not have the imprimatur of the full court. As our IOPs explain, a precedential opinion of a panel of this court circulates to all members of the court for eight days before it is filed. IOP 5.7. This gives non-panel active judges the opportunity to make comments or to seek an en banc

hearing if a judge believes that the issue requires the consideration of and determination by the full court. In contrast, NPOs, whether designated as per curiam or signed by a member of the court, do not circulate because they are written primarily to explain to the parties the basis for the court's determination.

The issue has arisen only recently with the publication of such opinions on-line and in the Federal Appendix series published by West Publishing. This court does not prohibit citation to NPOs but the members of this court regard them for what they are worth – the opinion of three members of the court in a particular case.

Some NPOs would easily receive the imprimatur of the full court because they are denominated NPOs on the premise that they merely apply settled circuit law. Nothing in the per curiam opinion in *Paz* suggests that the panel intended to articulate a new standard for the crime-fraud exception. Indeed, the page of *In Re Grand Jury Subpoena* cited in *Paz* for the "related to" standard stated that the second prong of the crime-fraud exception requires showing that "the attorney-client communications were *in furtherance of* that alleged crime or fraud." *In re Grand Jury Subpoena*, 223 F.3d at 217 (emphasis added). We recognize that the reference to "related to" in *In Re Grand Jury Subpoena* may have misled the District Court in this case.

This court's precedential opinions have repeatedly set forth the crime-fraud test as requiring that the communication have been "in furtherance" of the crime, not only in *In re Grand Jury Subpoena*, 223 F.3d at 217, but more recently in *Doe*, 429 F.3d at 454. *See also Haines*, 975 F.2d at 95. Indeed, the Assistant U.S. Attorney so stated at the

oral argument before us, and that is the standard we apply here. Of significance, despite the District Court's articulation of the more relaxed "related to" standard, in fact the District Court made the requisite finding under the "in furtherance of the crime" standard.

When questioned by this court at the oral argument as to how the Attorney-Jane Doe conversation furthered the crime of obstruction of justice, the Assistant U.S. Attorney used as an example a baseball player who seeks information about a grand jury investigation of the illegal use of steroids. He posited a player who

> receive[d] a subpoena that directly asks for documents related to his potential criminal use of illegal drugs. And in the course of that he does, takes certain steps to prevent the documents from being turned over, for example, by destroying them.

Transcript of Oral Argument at 44. One may infer from his use of that example that the obstruction of justice that the Government is investigating is the deletion of potentially relevant email files with knowledge of their relevance to the grand jury's investigation.

In this era, when communications between leaders of business organizations are transmitted to their employees by email rather than by phone or mail, examination of those emails is the method most commonly used by government investigators. That is evident to those engaged in the criminal or fraudulent activity that is the subject of the investigation. It should therefore come as no surprise that efforts to forestall such investigations frequently take the form of deletion of past emails. *See, e.g., Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

In *United States v. Quattrone*, No. 04-5007-CR, 2006 WL 700978 (2d Cir. Mar. 20, 2006), the Government's charge of obstruction of justice was based in part on an email from the defendant, Quattrone, who chaired the Company's Tech Group, to the bankers in that group. Quattrone was aware of the existence of the grand jury and regulatory investigations. His email (the "Endorsement Email") attached an email from a banker in the Tech Group which urged recipients not to preserve documents under the company's document retention policy and stated, "Note that if a lawsuit is instituted, our normal document retention policy is suspended and any cleaning of files is prohibited under the [company's] guidelines (since it constitutes the destruction of evidence). *We strongly suggest that before you leave for the holidays, you should catch up on file cleanup.*" *Id.* at *5 (emphasis added). Quattrone's Endorsement Email, the basis for the indictment, stated, "having been a key witness in a securities litigation case in south [T]exas . . . I strongly advise you to follow these procedures." *Id.* at *6. The court noted that the Tech Group had not been asked to preserve documents. The court stated that as a "result of the Endorsement Email, at least some Tech Group bankers began or continued 'cleaning' their files." *Id.*

In considering whether the evidence was sufficient to convict Quattrone of corruptly endeavoring to obstruct a grand jury proceeding, 18 U.S.C. §§ 1503 & 1505, the Court of Appeals stated that "[t]here was sufficient evidence from which a trier of fact could conclude that the government established the nexus element of the [count at issue]. A rational trier of fact could conclude beyond a reasonable doubt that Quattrone knew that his conduct would obstruct the grand jury's investigation because

there was a logical relationship between his knowing conduct – sending the Endorsement Email while aware of the grand jury subpoena's call for documents relating to the IPO allocation process that were in the possession of Tech Group bankers – and the effect it was likely to have – destruction of documents that otherwise would have been produced." *Id.* at *10. The court's subsequent vacation of the conviction for a jury instruction error and remand for trial does not detract from the significance of its holding that, based on the evidence referred to above, "the jury could infer that Quattrone was aware that his conduct was likely to affect the grand jury investigation." *Id.*

The Government's position in this case is that the communication between Attorney and Jane Doe provided her with knowledge of the type of material the Government sought, comparable to the documents relating to the IPO allocation process sought in *Quattrone*. The decision of the Court of Appeals for the Second Circuit held that destruction of these documents with knowledge that they were sought was sufficient to constitute obstruction of justice. In this case, the Assistant U.S. Attorney continued his explanation of how the Attorney-Jane Doe conversation furthered the crime by referring again to the hypothetical baseball player:

> And in order to keep on top of where the grand jury is going and what it's investigating and whether the records it may be looking for are going to be sought next he continues to communicate with his attorney, who is in turn the only person authorized to communicate with the federal prosecutor who is conducting the investigation.

> And as a consequence, *through those communications famous baseball player continues to be aware of where the investigation is going and uses the information to destroy evidence to obstruct the investigation*.
>
> Is that relationship, are the communications that are being used between the attorney and the prosecutor and the target in furtherance of ongoing criminal activity? I would submit that they certainly are.
>
> Is the conduct here, are these communications the type that this court should protect under the attorney/client privilege? Absolutely not.
>
> Is it this situation that we see in Doe where a client decides, okay, I'm going to, I want to go and get involved in some criminal scheme with some target of an investigation, how can I go about doing this, and goes to a lawyer. No, that's not what we have here.
>
> But we have an attorney/client relationship that was used and abused by a person who was directly involved in destroying evidence to thwart an investigation. Those are not the type of confidential communications that this court should protect.

Transcript of Oral Argument at 44-45 (emphasis added).

Concededly, there are no opinions of which we are aware that apply the crime-fraud exception in precisely these circumstances. However, we see no reason why it does not apply. The Assistant U.S. Attorney stated, or it can be inferred from his statements at oral argument, that in the course of the communication between Jane Doe and Attorney, Attorney advised Jane Doe of the contents of the

most recent subpoena and of the Government's interest in retrieving from Organization's computers emails to or from certain persons, including Jane Doe, who were or are connected with the Organization. Apparently, the ongoing deletion of email included information stored on the hard drive of Jane Doe's own computer. There is no suggestion that Attorney did anything improper in transmitting this communication to Jane Doe and providing legal advice on how to respond. Nor is there any suggestion that Attorney was aware of either past wrongdoing or potential future wrongdoing.[4]

If, with knowledge of the Government's interest in retrieving any remaining emails, Jane Doe continued to receive emails that were arguably responsive to the subpoena and failed to use her position as an executive of the Organization to direct that all email deletions stop immediately, she may be viewed as furthering the obstruction of the grand jury's investigation or the obstruction of justice. *Cf. United States v. Laurins*, 857 F.2d 529, 541 (9th Cir. 1988) (holding that crime-fraud exception applied where client obstructed justice by removing responsive documents from jurisdiction and used counsel to misrepresent to IRS that records sought were no longer available). Certainly, the temporal proximity of the ongoing deletion

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[4] Of course, the crime-fraud exception applies even when an attorney is unaware that the client is engaged in or planning a crime. *See, e.g., In re Grand Jury Proceedings*, 87 F.3d 377, 382 (9th Cir. 1996) ("It is therefore irrelevant, for purposes of determining whether the communications here were made 'in furtherance of' Corporation's criminal activity, that [counsel] may have been in the dark about the details of that activity."); *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985) ("It is well settled that an attorney's ignorance of his client's misconduct will not shelter that client from the consequences of his own wrongdoing.").

of emails after January 20 could be viewed as an additional indication that Jane Doe intended to use the information she gathered from the January 20 communication to further the scheme to obstruct. *See In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985) (noting that more than "mere coincidence in time" is needed to support invocation of crime-fraud exception).[5] In any event, if Jane Doe learned of the Government's interest in certain documents from her conversation with Attorney on January 20, 2005 and subsequently acquiesced in the deletion or destruction of those documents, the second prong of the crime-fraud exception would be satisfied.

According to the Assistant U.S. Attorney's statements at the oral argument, Jane Doe's communication with Attorney on January 20 made it clear what the Government wanted and what was called for in response to the subpoenas. As we previously noted, the Government does not bear a heavy burden in showing that Jane Doe misused her communication with Attorney in furtherance of an improper purpose. As one court has observed,

> The government does not have to show that the intended crime or fraud was accomplished, only that the lawyer's advice or other services were misused. Typically that can be shown by evidence of some activity following the improper consultation, on the part of either the client or the lawyer, to advance the intended crime or fraud.

In re Public Defender Serv., 831 A.2d 890, 910 (D.C. 2003).

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[5] We do not suggest that passive receipt by a low-level employee of an email that could be viewed as suggesting deletion of stored emails necessarily suggests that the employee has furthered the obstruction of justice. But Jane Doe was not such an employee.

We cannot lose sight of the ultimate fact that the attorney-client privilege is designed to promote the fair administration of justice. Thus, while we have acknowledged that the privilege serves "to encourage clients to make full disclosure of facts to counsel so that he may properly, competently, and ethically carry out his representation," *In re Grand Jury Proceedings (FMC)*, 604 F.2d 798, 802 (3d Cir. 1979), we have also made it clear that "[t]he ultimate aim [of the privilege] is to promote the *proper* administration of justice." *Id.* (emphasis added). A client's criminal misuse of advice from counsel clearly serves to frustrate this goal. *Id.*

The District Court here was required to, and did, closely scrutinize the Government's evidence, and it also received in camera evidence proffered by Attorney and Doe's Attorney regarding the substance of the January 20 communication. Although the District Court was compelled by the secrecy of the grand jury proceeding to redact its substantive analysis from the version of its Opinion that it released to the parties, an unredacted version of its Opinion has been provided to this court. Based on our review of the same evidentiary record and the District Court's thoughtful analysis, we see no abuse of discretion in the District Court's decision to enforce the subpoena to Attorney.

We note also that Jane Doe does not take issue with the scope of the District Court's order concerning the documents and testimony Attorney was to provide to the grand jury, and we are satisfied that the District Court properly tailored its order to cover only those subjects implicated by the crime-fraud exception.

IV.

For the reasons stated, we will affirm the District Court's February 1, 2006, order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1474

IN RE: GRAND JURY INVESTIGATION*

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 03-gj-00123-07)
District Judge: Hon. Legrome D. Davis

Before: SLOVITER, AMBRO
and NYGAARD, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on March 9, 2006.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered February 1, 2006, be and the same is hereby affirmed. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

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* Cite as *In Re: Grand Jury Investigation*, No. 06-1474.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: April 21, 2006

Certified as a true copy and issued in lieu of a formal mandate on May 30, 2006.

Teste: /s/ Marcia M. Waldron
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 9, 2006

No. 06-1474

IN RE: GRAND JURY INVESTIGATION

Jane Doe, Appellant

(ED of PA Grand Jury No. 03-GJ-00123-07)

Present: SLOVITER, AMBRO and NYGAARD, *Circuit Judges*.

1) Emergency Motion by Appellant, Jane Doe, to Release Full Opinion and/or to Unredact District Court Opinion or in the Alternative, to Appoint or Allow Retention of Special Counsel to View Opinion In Its Unredacted Form.

2) Response by Appellee, USA, in Opposition to Appellant's Motion to Release Full Opinion and to Appoint Special Counsel.

3) Reply by Appellant, Jane Doe, to Opposition of the United States to Emergency Motion to Release Full Opinion

ORDER

Jane Doe's emergency motion to release full opinion and/or to unredact District Court opinion, or in the alternative to appoint or allow retention of special counsel to view opinion in its unredacted form is DENIED. Under the precedent of this court, such motions are within the District Court's discretion, and not violative of due

process, for essentially the reasons stated by the Government in its opposition.

By the Court,

/s/ D.K. Sloviter
Circuit Judge

Dated: Feb. 10, 2006

CMD/cc: JLF
WHL
SCM
JCS
JJP

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY SUBPOENA	:	No. 03-123
IN THE MATTER OF THE SUBPOENAS ISSUED ON MARCH 1 AND MARCH 10, 2005	:	

MEMORANDUM OPINION

J. Davis — February 1, 2006

Presently before the Court are the government's motion to enforce the March 1, 2005 and March 10, 2005 grand jury subpoenas and to compel testimony of Attorney, Attorney's motion to quash or modify the subpoenas, Jane Doe's motion to quash or modify the subpoenas, and all responses and reply briefs thereto. For the following reasons, this Court's grants the government's motion to enforce the grand jury subpoenas, and denies Attorney's and Jane Doe's motions to quash.

I. Factual and Procedural History

Attorney represents Organization,[1] which is a target of a federal grand jury investigation. (*See* Gov. Mot., at ¶ 1). Attorney has represented Organization during the entirety of the time relevant to the parties' motions. (*Id.*). Jane Doe [redacted] is the executive

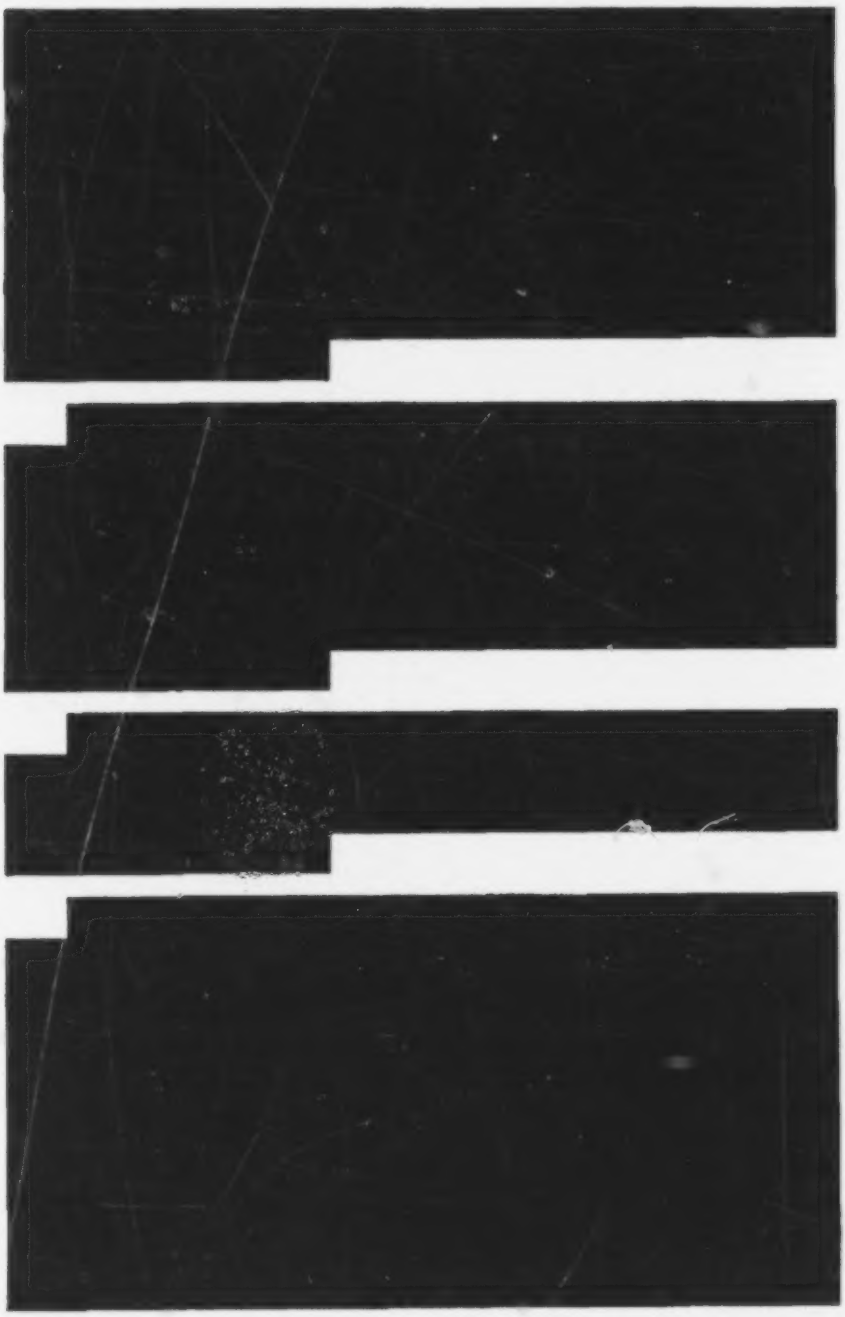
[1] Pursuant to Local Rule of Criminal Procedure 6(c)(3), the Court uses pseudonyms to protect the anonymity of the parties.

director of Organization. (*Id.*) [redacted] Attorney, on behalf of Organization, has entered a joint defense agreement with Jane Doe and her counsel. (*See* Letter referencing agreement, attached as Ex. C. to Attorney's Br.).

On April 28, 2004, Organization received a federal grand jury subpoena seeking the production of all documents, including e-mail communications, from January 1, 1996 until the present concerning, *inter alia*, Organization's document retention and destruction policy, the payment of certain expenses, contributions, or donations to Former Employer, all grants, contributions, donations or pledges received by Organization, and the solicitation or receipt of contributions or donations to Former Employer. (*See* April 27, 2004 Subpoena, at ¶¶ 13, 18-22). Attorney produced documents on behalf of Organization in response to the April 28, 2004 subpoena. (*See* January 19, 2005 Letter from Gov. to Attorney; Gov. Decl., at ¶ 6).

After receiving Organization's document production, the government notified Attorney that electronic data files responsive to the April 28, 2004 subpoena, including e-mail communications, were not produced. (*See* January 19, 2005 Letter from Gov. To Attorney; Gov. Decl. at ¶ 7). [redacted] The government requested access to Organization's computer system to recover electronically stored communications and files, including deleted information. (*See* January 19, 2005 Letter from Gov. To Attorney). In addition, the government provided Attorney with a second subpoena, issued January 18, 2005, that requested the production of the same documents previously subpoenaed

and of several additional categories of documents. (*See* January 18, 2005 Subpoena; Gov. Decl., at ¶ 8).



On March 1, 2005, the government issued a subpoena to Attorney seeking his appearance before the grand jury on March 22, 2005. (*See* March 1, 2005 Subpoena). The March 1, 2005 subpoena also commanded Attorney to bring all documents reflecting communications with Organization, its officers, employees, and their attorneys, and government counsel that involve: the requirements of the April 28, 2005 and January 18, 2005 subpoenas and the January 19, 2005 letter; the understandings and agreements reached with the government counsel concerning the two subpoenas and the January 19, 2005 letter; and the efforts to comply with the two subpoenas and January 19, 2005 letter. (*Id.*) On March 10, 2005, the government issued a subpoena to the custodian of records for Attorney's law firm. (*See* March 10, 2005 Subpoena).

Government, Attorney, and Jane Doe attempted to work out an agreement to limit Attorney's testimony before the grand jury proceeding. (*See* Gov. Mot., at ¶¶ 6-10; Proposed Aff. of Attorney, attached as Ex. B. to Gov. Mot.). Specifically, the government requested that Attorney testify: [REDACTED] (*See* Gov. Mot., at ¶¶ 6-9; Proposed Aff. Of Attorney, at ¶¶. Jane Doe refused to permit Attorney to testify as to the last subject. (*See* Gov. Mot., at ¶ 10).

On January 4, 2006, the government filed a motion to enforce the subpoena and compel testimony. Attorney and Jane Doe ("intervenors") filed a reply to the government's motion, along with separate motions to quash or modify the subpoena. Both Attorney and Jane Doe seek to quash the subpoena to the extent that it requires Attorney to divulge the content of the January 20, 2005 conversation between Attorney and Jane Doe concerning compliance with the January 18, 2005 subpoena and to produce Attorney's hand written notes of the conversation.

II. Discussion

Government seeks to enforce the March 1, 2005 and March 10, 2005 subpoenas to compel Attorney to testify on those issues identified in the proposed affidavit, to testify as to all communications between Attorney and government counsel relating to the April 24, 2004 and January 18, 2005 subpoenas, and to produce documents concerning these topics. (*See* Gov. Mot., at ¶¶ 6-11; Proposed Affidavit, attached as Ex. B. to Gov. Mot.).[2]

[2] During the January 17, 2006 oral argument, the government voluntarily narrowed the scope of the March 1, 2005 and March 10, 2005 subpoenas to the aforementioned testimony and documents. (*See* Tr., at 4-6).

In response,[3] intervenors explicitly agree that Attorney shall testify as to items ¶ 1-4 in the proposed affidavit and shall produce all documents associated with these subjects. (*See* Tr., at 12-13, 15-16). Intervenors also implicitly agree that Attorney shall testify as to communications between Attorney and government counsel relating to the April 28, 2004 and January 19, 2005 subpoenas, as intervenors failed to raise an appropriate challenge to the propriety of this relief in their written submissions or at oral argument. (*Id.*).[4] However, intervenors claim that ¶ 5 of the proposed affidavit, which seeks testimony as to the substantive content of the January 20, 2005 conversation between Attorney and Jane Doe, and Attorney's handwritten notes reflecting this conversation, are protected by the attorney-client and work-product privileges. (*See* Jane Doe's Br. In Support of Mot. To Quash, at 4-25; Attorney's Br. In Support of Mot. To Quash, at 4-10; Tr., at 12, 16). Accordingly, intervenors seek to modify the March 1, 2005 and March 10, 2005 subpoenas to avoid disclosure of this information.

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[3] Intervenors also focused their challenges to the March 1, 2005 and March 10, 2005 subpoenas at oral argument.

[4] Furthermore, any communications between Attorney and government counsel concerning the relevant subpoenas are clearly not privileged. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-1432 (3d Cir. 1991) (voluntary disclosure of otherwise privileged documents to investigating government agency waives attorney-client and work-product privileges, even if party reasonably expects government agency to maintain confidentiality of information); *E.E.O.C. v. Airborne Express*, 1999 WL 23676, at *2 (E.D. Pa. April 20, 1999) ("The attorney-client privilege only applies to communications that were intended to remain confidential.").

A. Standard

Evidentiary privileges, such as the attorney-client and work-product privileges, apply to grand jury proceedings. *See* Fed. R.. Evid. 1101(d)(2) (noting the rules "with respect to privileges" apply to grand jury proceedings); *United States v. Calandra*, 414 U.S. 338, 346 (1974). The party asserting the privilege bears the burden of demonstrating its applicability. *See, e.g., United States v. Furst*, 886 F.2d 558, 576 (3d Cir. 1989); *In re Manner of Grand Jury Empaneled February 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979). However, once a party demonstrates that a particular communication satisfies the elements of a particular privilege, the burden of meeting an exception to the privilege, such as the crime-fraud exception, falls upon the party seeking discovery. *See In re Impounded*, 241 F.3d 308, 317 (3d Cir. 2001).

1. Attorney-Client Privilege

The government contends that the January 20, 2005 conversation between Attorney and Jane Doe fails to meet the technical elements of the attorney-client privilege. (*See* Gov. Br., at 3-4). Specifically, the government argues that Attorney's January 20, 2005 discussion with Jane Doe regarding the appropriate way to respond to the January 18, 2005 subpoena involved the conveyance of mechanical, factual information not subject to the attorney-client privilege. (*Id.*).

Intervenors dispute the government's characterization of the content of their January 20, 2005 conversation. (*See* Jane Doe's Br., at 8-13; Attorney's Br., at 4-6). While intervenors acknowledge the inapplicability of the privilege to communications conveying mechanical, factual

information, they argue that the January 20, 2005 conversation concerned the transmission of confidential legal advice. (*Id.*).

a. Scope

The attorney-client privilege of federal common law protects confidential written and oral communications from a client to an attorney. *See, e.g., In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980) ("The attorney-client privilege extends to confidential disclosures made by a client to an attorney in order to obtain legal assistance."). The Third Circuit has more aptly phrased this primary protection offered by the attorney-client privilege, stating that when "legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence, *by the client*, are at his insistence permanently protected from disclosure by himself or by the legal advisor, except the exception [may] be waived." *In re Impounded*, 241 F.3d at 316 n. 6 (emphasis added).

In addition to confidential oral or written communications from a client to an attorney, the attorney-client privilege under federal common law also offers some degree of protection for communications from an attorney to a client. *See* 1 Paul Rice, Attorney-Client Privilege in the United States § 5:2 (2d ed. 2005) (collecting cases providing derivative protection for attorney-to-client communications). Courts take different views as to the scope of this protection. *Id.* (discussing different approaches); 1 Rothstein & Crump, Federal Testimonial Privileges 2d § 2:13 (2005) (acknowledging different approaches to applicability of attrney-client privilege to communications from attorney to client). For

instance, some courts applying federal common law take a broad view of the applicability of the privilege to attorney-to-client communications, finding that all such communications are privileged if made during the course of offering legal advice. *See, e.g., Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370-1371 (10th Cir. 1997) (finding that privilege under federal common law protects attorney-to-client communications, regardless of whether these communications reveal client confidences). Other courts, however, take a much narrower view, extending the privilege to only those attorney-to-client communications that reveal the substance of protected client-to-attorney communications or which are based upon such communication. *See, e.g., In re Grand Jury Witnesses*, 979 F.2d 939, 943-944 (2nd Cir. 1992) ("Where the client is a corporation, as here, the privilege extends to communications between a lawyer and his or her client-both information provided to the lawyer by the client and professional advice given by an attorney that discloses such information).

The Third Circuit has adopted the broader approach to the protection of attorney-to-client communications under federal common law. *See United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980) ("legal advice or opinion from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the attorney-client privilege"); *see also Loftis v. Amica Mutual Ins. Co.*, 175 F.R.D. 5, 9 (D.Conn. 1997) (recognizing Third Circuit's expansive definition of the attorney-client privilege under federal common law as protecting all "[confidential] communications from the lawyer, regardless of whether [t]he lawyer's communications reveal confidences from the client"). According to the Third Circuit, broad protection for attorney-client

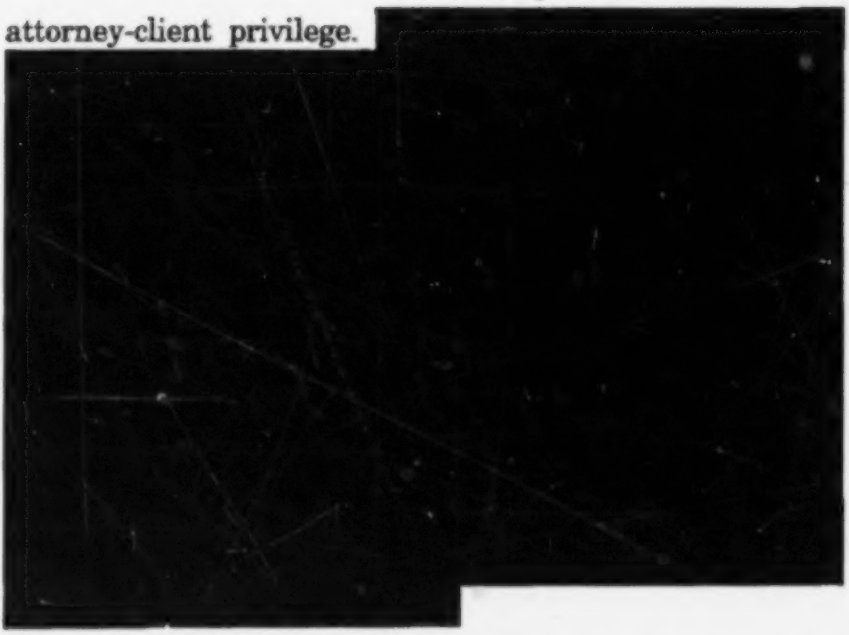
communications, regardless of the content of any client communication, appropriately recognizes the vitality of protecting all legal advice from disclosure. *Id.*

This is not to suggest that there are no limits to the scope of the attorney-client privilege. The privilege does not protect facts underlying or incorporated within attorney-client communications. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-396 (1981) ("protection of the [attorney-client] privilege extends only to communications and not to facts"); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994). Nor does the privilege protect communications that are not meant to obtain or convey confidential legal advice, such as communications that convey the factual mechanics of a document search in response to a subpoena or that notify a client of a particular trial date. *See, e.g., In re Feldberg*, 862 F.2d 622, 627-628 (7th Cir. 1988) (communications concerning mechanical nature of document search, including who, how, when, and where of search, not protected by attorney-client privilege, although communications between attorney and client regarding scope of subpoena, such as whether certain documents need or need not be produced, retain privileged status); *In re Grand Jury Proceedings*, 5658 F.2d 555, 557 (8th Cir. 1977) ("Communications by a defense counsel to the client or by a client to the defense counsel regarding the time and place of trial are not confidential and therefore are not protected by the attorney-client privilege.").

2. Application

This Court finds that Attorney's January 20, 2005 conversation with Jane Doe falls under the aegis of the

attorney-client privilege.



This Court also finds that Attorney's hand-written notes of the January 20, 2005 conversation fall under the attorney-client privilege. An attorney's notes of a privileged conversation with a client are themselves protected by the attorney-client privilege, to the extent that they record the content of the conversation. *See Swidler & Berlin v. United States*, 524 U.S. 399, 410-411 (U.S. 1998) (attorney's notes of interview with client protected by attorney-client privilege in criminal context, even after client's death); *Upjohn*, 449 U.S. at 397 (privilege attaches to attorneys' notes recording corporate employees' responses during privileged conversation with corporate counsel).

B. Work-Product Privilege

Intervenors also contend that the content of the January 20, 2005 communicational exchange between

Attorney and Jane Doe is protected by the work-product privilege. (*See* Jane Doe's Br., at 16-20; Attorney's Br., at 6-7).

1. Scope

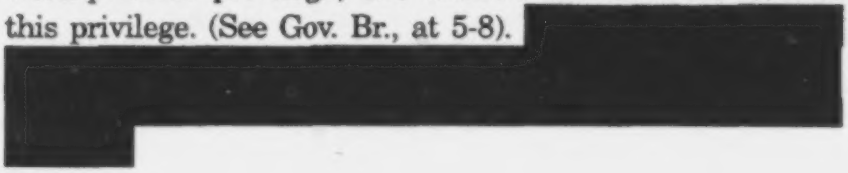
The work-product privilege applies to criminal cases as well as civil cases. *See United States v. Nobles*, 422 U.S. 225, 238 (1975). This privilege protects materials prepared by an attorney on behalf of his client in anticipation of litigation. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 510-511. At its core, the work-product privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Nobles*, 422 U.S. at 238. This covers all tangible and intangible embodiments of these mental processes, such as interviews, statements, memoranda, correspondence, briefs and mental impressions. *Hickman*, 329 U.S. at 510-511. The Third Circuit has afforded an attorney's "core" or "opinion" work-product "almost absolute protection from discovery." *See, e.g., Haines*, 975 F.2d at 94; *see In re Cendant Corp. Securities Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (noting extraordinary protection afforded to work-product that reveals lawyers mental processes).

2. Application

This Court also finds that Attorney's January 20, 2005 verbal communications to Jane Doe [redacted], as well as Attorney's hand written notes memorializing this conversation, constitute work product. [redacted]

C. Crime-Fraud Exception

The government contends that even if the content of Attorney's January 20, 2005 conversation with Jane Doe initially falls under the protection of the attorney-client or work-product privilege, the crime-fraud doctrine defeats this privilege. (See Gov. Br., at 5-8).



[5] This practice of submitting an *ex parte* affidavit in support of the applicability of the crime-fraud exception to potential grand jury testimony is consistent with due process considerations. *See, e.g., In re Grand Jury Subpoena*, 223 F.3d at 219 (holding that "it is within the district courts' discretion, and not violative of due process, to rely on an ex parte government affidavit to determine that the crime-fraud exception applies and thus compel a target-client's subpoenaed attorney to testify before the grand jury"). This practice preserves the secrecy of the grand jury, while ensuring that this body does not abuse its powers. *Id.* In this instance, the government made a sufficient showing to warrant *in camera* review. *See United States v. Zolin*, 491 U.S. 554, 572, 575 (1989)

1. Scope

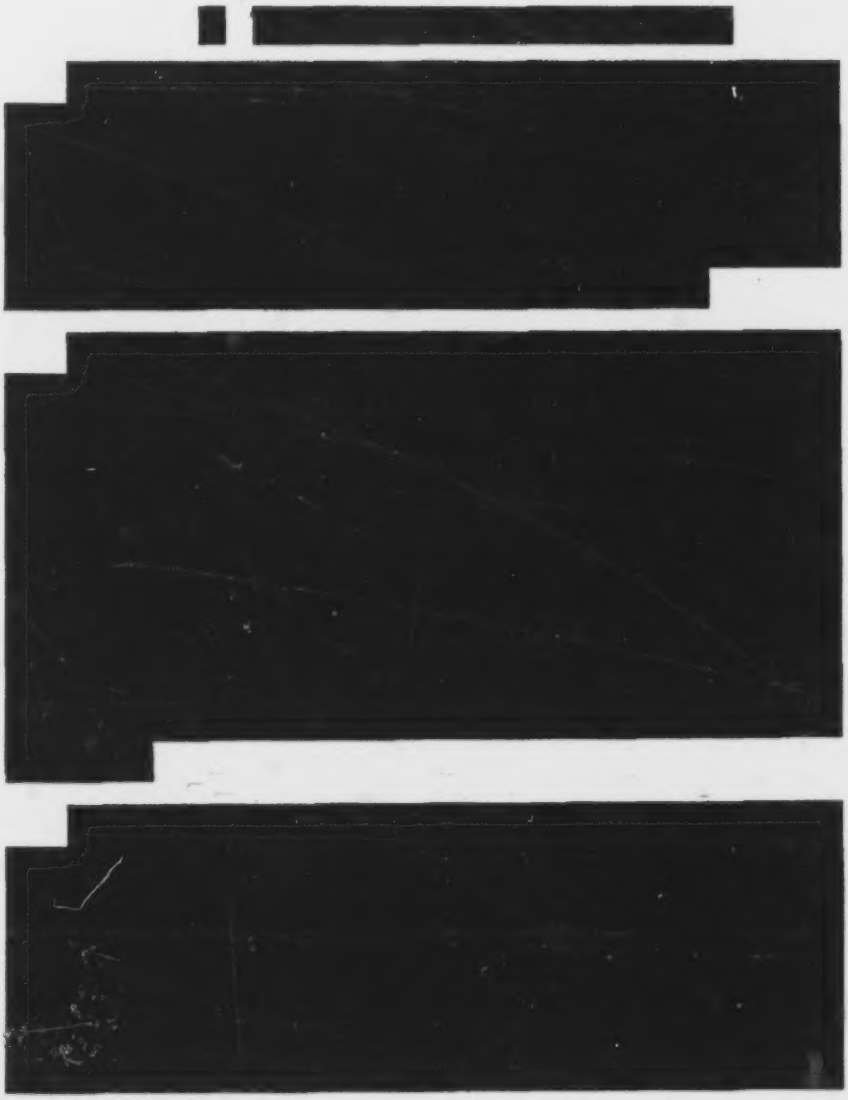
The crime-fraud doctrine functions as an exception to the work-product privilege and the attorney-client privilege. *See, e.g., In re Grand Jury Proceedings*, 604 F.2d 798, 802-803 (3d Cir. 1979). The crime-fraud exception applies to "any communications between an attorney and client that are intended 'to further a continuing or future crime or tort.'" *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005). The rationale behind this exception is that the protections afforded a client by and evidentiary privilege, which seeks to facilitate the proper administration of justice, should not apply when a client attempts to exploit the attorney-client relationship, indeed, when a client attempts to thwart the administration of justice by misusing an attorney's advice to further a criminal purpose. *Id.*

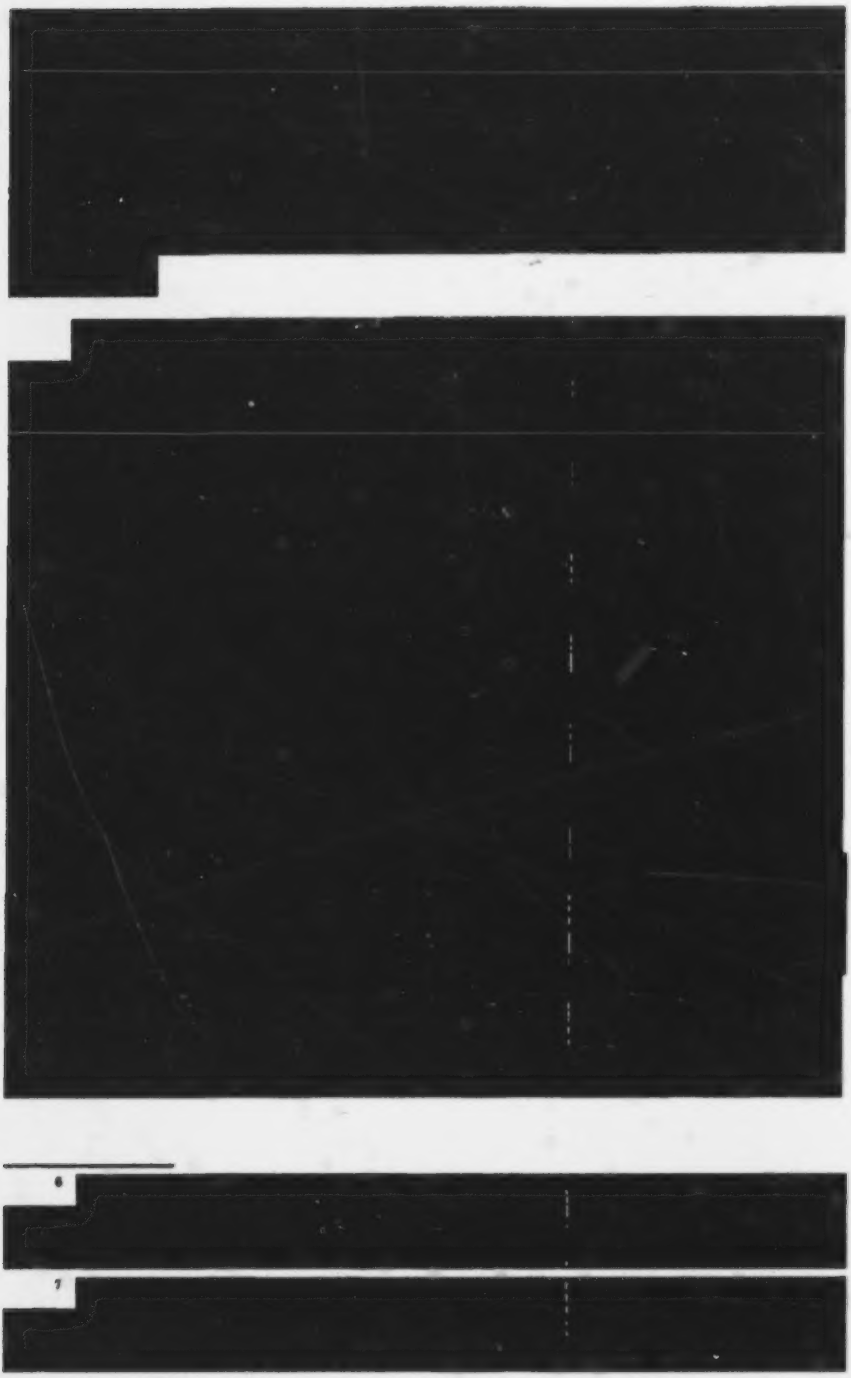
The party seeking to compel testimony under the crime-fraud exception bears the initial burden of making a *prima facie* showing: (1) that the client was committing or intending to commit a fraud or crime; and (2) that the privileged communication was used to further a fraud or crime. *See, e.g., In re Grand Jury Subpoena*, 223 F.3d at 217. In this analysis, the client's intention, both at the time of the communication and with respect to the use of the communication, is paramount. *See Doe*, 429 F.3d at 454 (emphasizing that the "client's intention controls"); 1 Rice, Attorney-Client Privilege in the United States § 8:5 (2005) ("The rationale behind the crime/fraud exception to the attorney-client privilege is to deprive those clients of the protection of the privilege when they seek to abuse the attorney-client relationship. Consequently, its focus has been on the *intent of the client.*"). Because it is the client's intention that controls the applicability of the crime-fraud exception, the exception may apply even when the lawyer

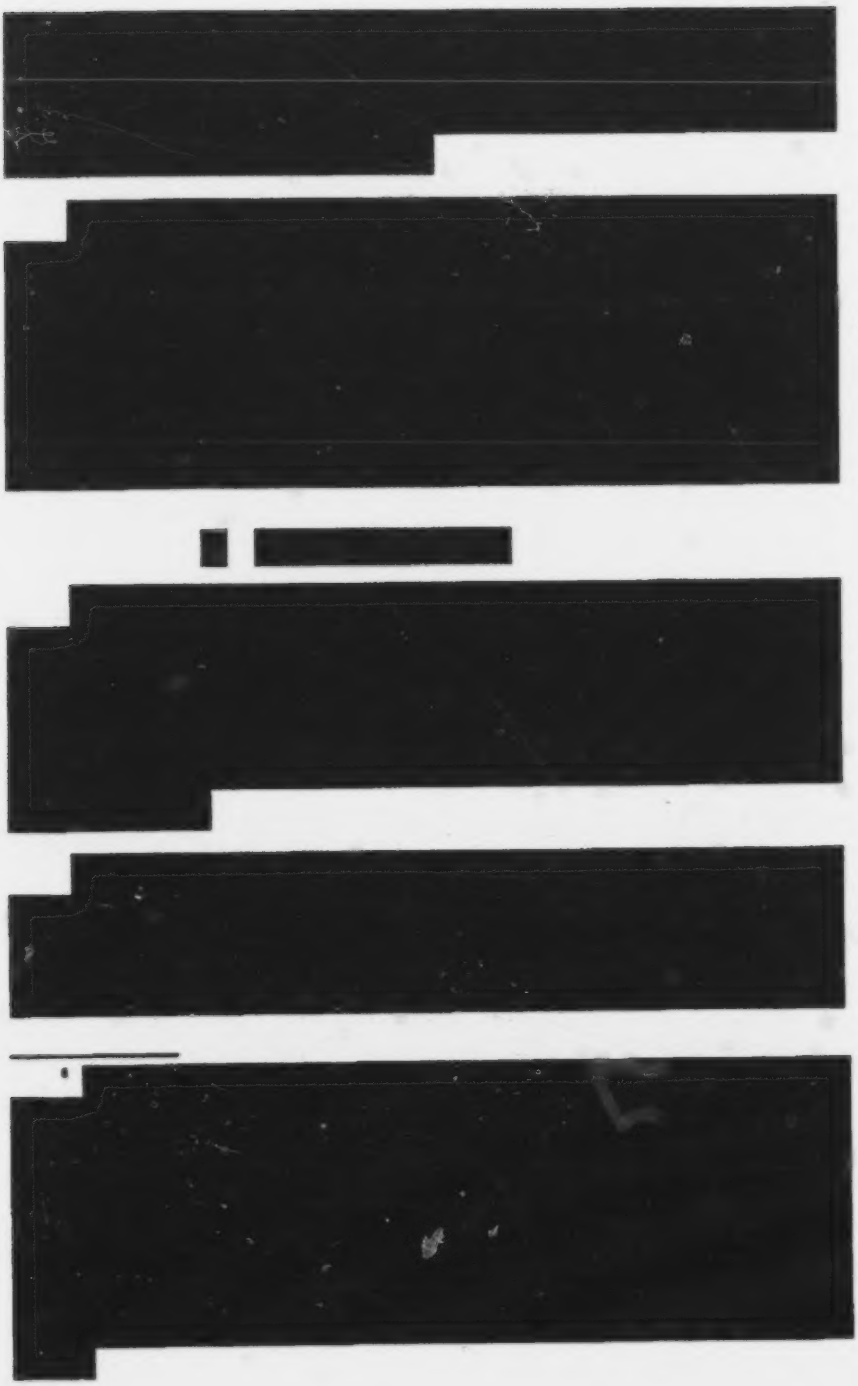
is innocent of any wrongdoing. *See In re Grand Jury Proceedings*, 604 F.2d at 802.

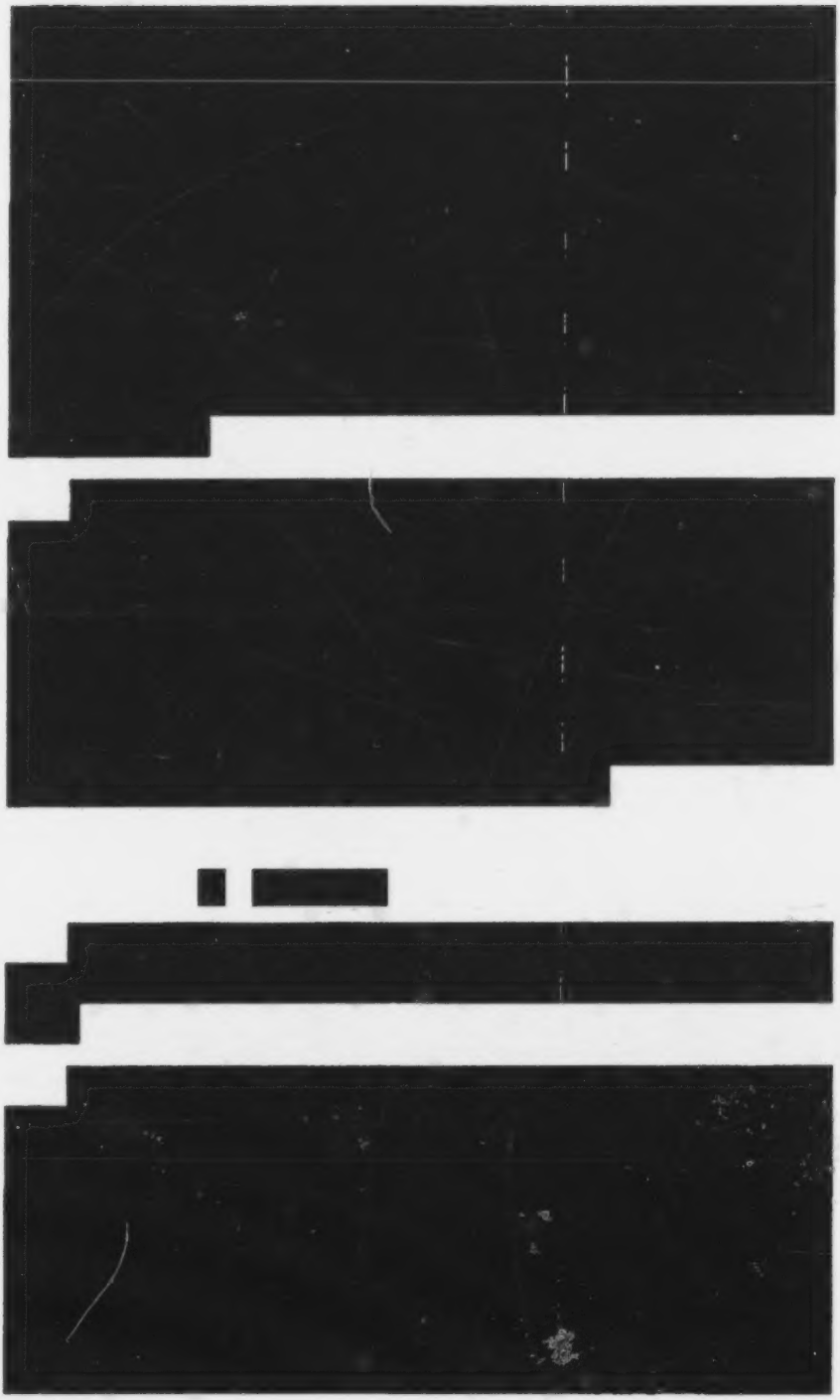
2. Application

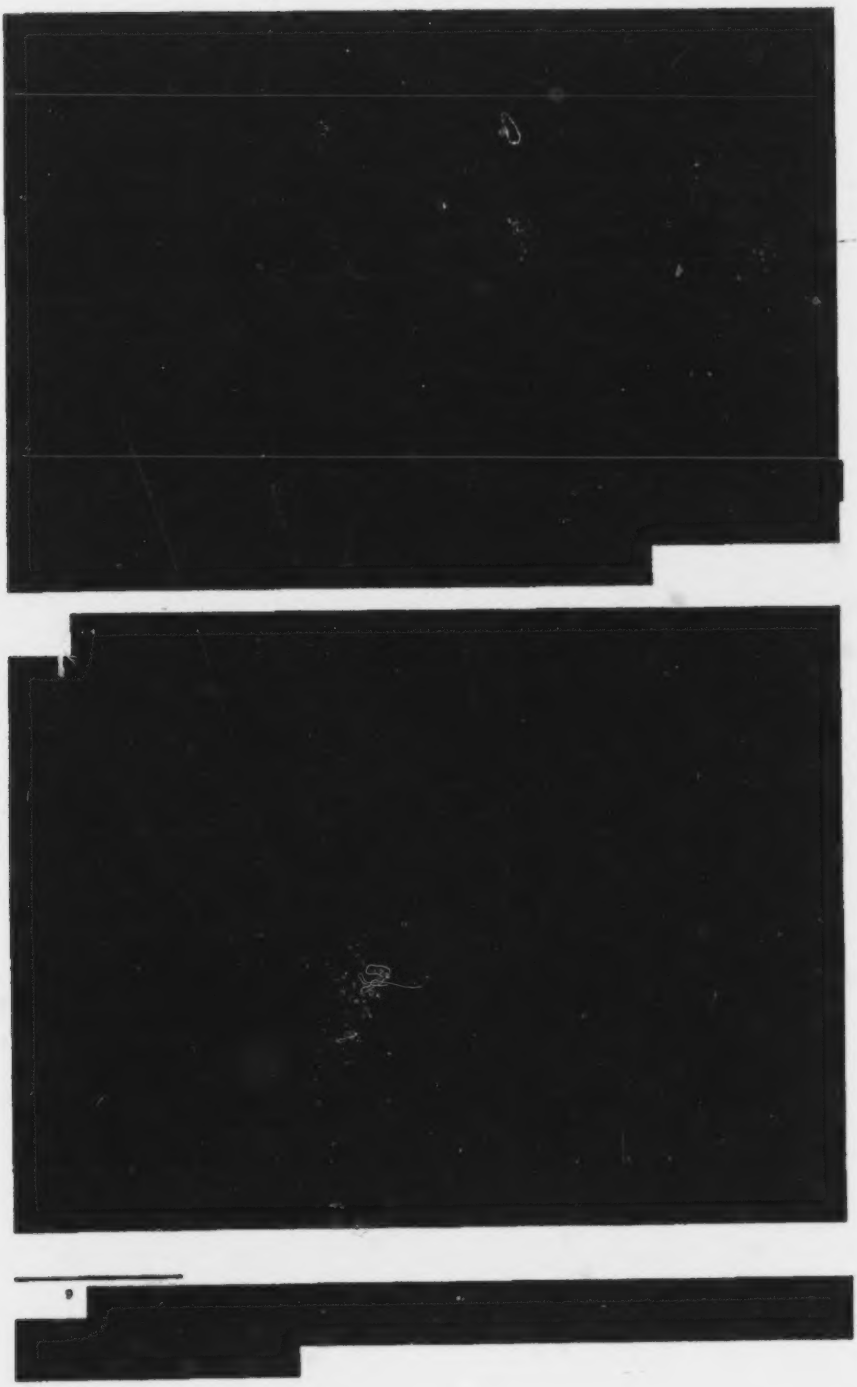
[REDACTED]

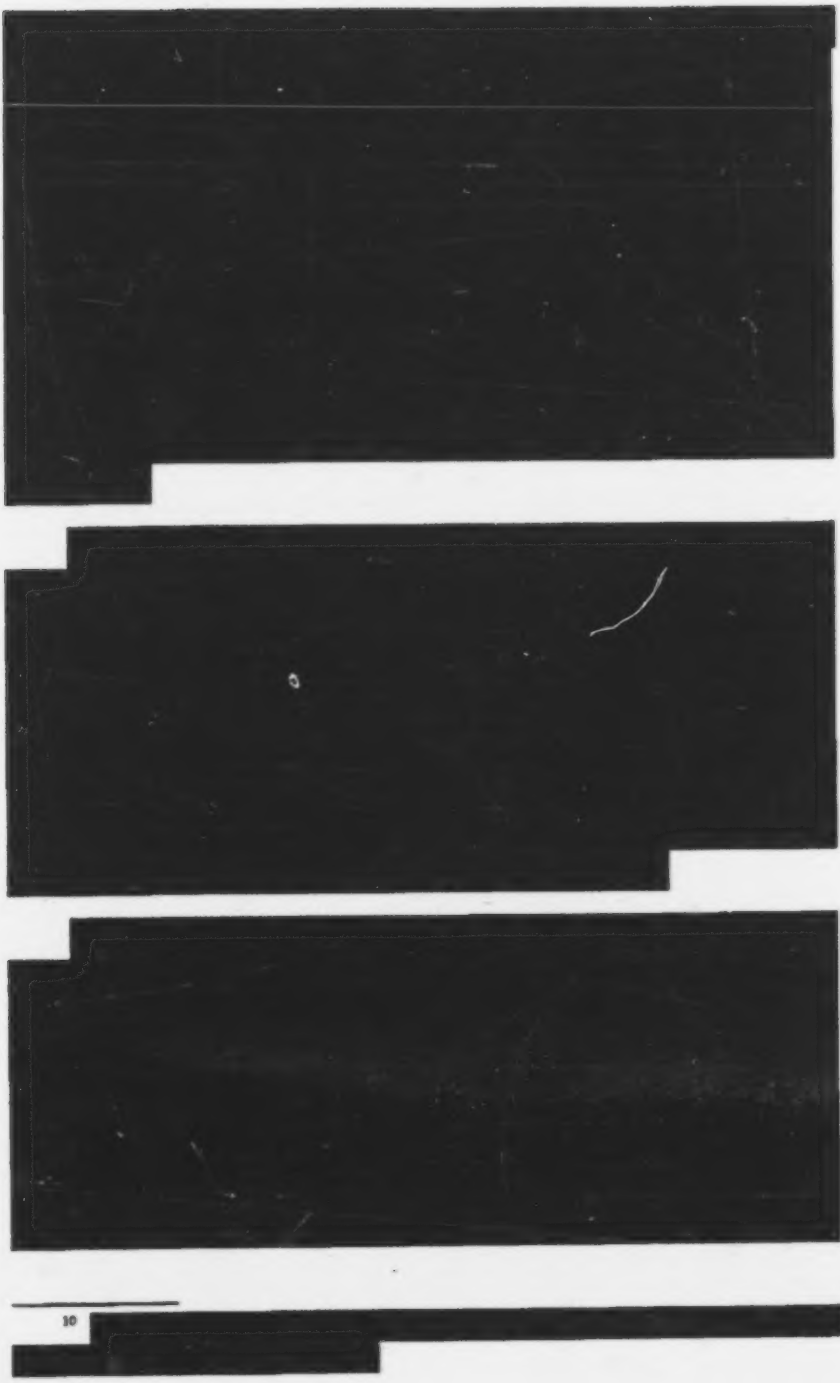


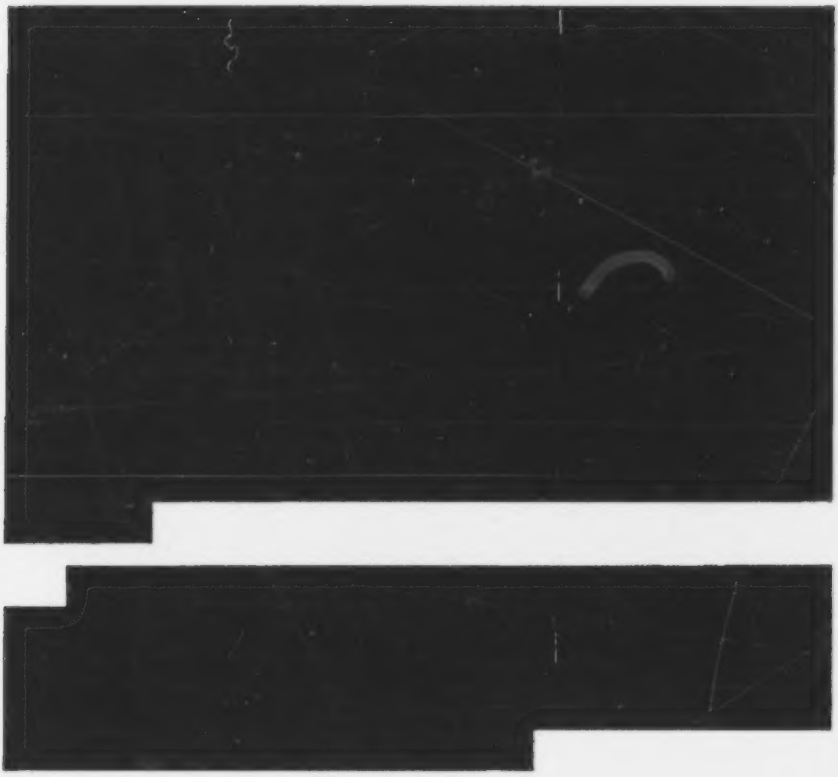












D. Conclusion

In conclusion, [REDACTED]. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY SUBPOENA	:	No. 03-123
IN THE MATTER OF THE SUBPOENAS ISSUED ON MARCH 1 AND MARCH 10, 2005	:	

ORDER

AND NOW, this 1st day of February 2006, upon consideration of the government's motion to enforce the March 1, 2005 and March 10, 2005 grand jury subpoenas and to compel testimony of Attorney, Attorney's motion to quash or modify the subpoenas, Jane Doe's motion to quash or modify the subpoenas, and all responses and reply briefs thereto, it is hereby ORDERED as follows:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]

BY THE COURT:

/s/ Legrome D. Davis, J.

Legrome D. Davis, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1474

IN RE: GRAND JURY INVESTIGATION

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, and NYGAARD,* *Circuit Judges*

The petition for rehearing filed by Appellant Jane Doe in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: May 19, 2006
ghb/cc: (William H. Lamb, Esq.
John J. Pease, III, Esq.
Joel L. Frank, Esq.

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* Honorable Richard L. Nygaard limited to panel rehearing only.

James C. Sargent, Jr., Esq.
Susan C. Mangold, Esq.
Scot R. Withers, Esq.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

TO: [redacted], Esquire
Philadelphia,
Pennsylvania 19103

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
X PERSON X DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear before the Grand Jury of the United States district Court at the place, date and time specified below.

PLACE	ROOM
Nix Courthouse & Post Office 900 Market Street Room 601 Philadelphia, PA 19107	Grand Jury Room 2
	DATE AND TIME March 22, 2005, 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

For the period April 28, 2004 to the present, with respect to [redacted], provide the following records concerning or pertaining to the Grand Jury subpoenas issued to [redacted] on April 28, 2004 and January 19, 2005 ("the subpoenas") and the letter dated January 19, 2005 from government counsel to [redacted] Esquire ("the letter"): any and all billing records, time sheets, fax cover sheets, memoranda, correspondence and other records concerning or relating to communications with [redacted] its officers, employees and their attorneys, and

government counsel regarding the requirements of the subpoenas and letter, understandings and agreements reached with government counsel concerning the subpoenas and the letter, and efforts to comply with the subpoenas and letter and agreements with government counsel.

___ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK /s/ Michael E. Kunz [SEAL] MICHAEL E. KUNZ	DATE March 1, 2005
[ILLEGIBLE] DEPUTY CLERK	
This subpoena is issued on application of the United States of America	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEYS H. Geoffrey Moulton, Jr. (215) 861-8490 John J. Pease (215) 861-8340 [/s/ JP] United States Attorney's Office 615 Chestnut Street, Suite 1250 Philadelphia, Pennsylvania 19106-4476